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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 621

STATE OF NEW JERSEY and BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,

Plaintiffs-Appellants,

~~and~~

~~COUNTY OF BERGEN, et al.,~~

~~*Plaintiffs-Intervenors-Appellants,*~~

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Respondents.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Opinions Below

The opinions of the District Court for the district of New Jersey are not yet reported. Copies of the majority opinion by Judge WORTENDYKE and the dissenting opinion by Circuit Judge MCLAUGHLIN are set out in Appendices A and B, respectively.

Jurisdiction

Plaintiffs State of New Jersey and the Board of Public Utility Commissioners of the State of New Jersey (hereinafter sometimes referred to as "State" and "Board", respectively) brought an action in the district court challenging the proposed discontinuance by the New York Central Railroad Company of its trans-Hudson River passenger ferry service pursuant to section 13a(1) of the Interstate Commerce Act. (This section was enacted into law by section 5 of the Transportation Act of 1958, 72 Stat. 568, .) Plaintiffs challenged the discontinuance on three grounds.

Plaintiffs contended that if section 13a were applied to permit *ex parte* discontinuance it would be unconstitutional under the Fifth Amendment. 28 U. S. C. §1331 confers jurisdiction on the district courts over actions to declare acts of Congress unconstitutional. *Brown* v. *O'Connor*, 49 F. Supp. 973 (D. Tex. 1943), aff'd 141 F. 2d 1019 (5th Cir. 1944). 28 U. S. C. §2282 requires the convocation of a three-judge court in such cases. The majority below entertained jurisdiction under 28 U. S. C. §§1331 and 2282.

Plaintiffs also challenged the refusal of the Commission to hold a hearing on the alternative grounds that the statutes involved made a hearing mandatory or that, if they merely conferred discretion on the Commission to hold a hearing, it amounted to an abuse of discretion for the Commission not to enter upon an investigation and hearing under the circumstances of the case.

The Commission published two instruments stating that it would not investigate the proposed discontinuance of the Weehawken ferry service. The first was denominated by the Commission as a "notice" and the other an "order". 28 U. S. C. §1336 confers jurisdiction on the district court

to "enjoin, set aside, annul or suspend" orders of the Commission. 28 U. S. C. §2325 requires the convocation of a three-judge court in such cases. The majority of the district court held that the "notice" and "order" were not orders within the meaning of 28 U. S. C. §1336, and in any event were not judicially reviewable because they involved action committed to agency discretion.

28 U. S. C. §1253 grants this court jurisdiction over appeals from any decision which by law can only be made by a three-judge district court. The majority below held that a three-judge court was properly convoked under 28 U. S. C. §1331 and §2281 to decide the constitutional question. Plaintiffs contend that the majority below erroneously declined jurisdiction under 28 U. S. C. §1336 and §2325 to review the legality of the orders of the Commission, and that, therefore, a direct appeal will lie under 28 U. S. C. §1253 on the issue of the legality of the Commission's action in declining to enter upon an investigation and hearing as to the proposed ferry discontinuance.

Many cases demonstrate the jurisdiction of this court over appeals such as those presented here. Where the constitutionality of a statute is involved, see *Aircraft and Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752 (1947); *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947). Where validity of an Interstate Commerce Commission order is involved, see *Pan-Atlantic Steamship Corp.* v. *Atlantic C. L. R.R.*, 353 U. S. 436 (1957), and *Allegheny Corp.* v. *Breswick*, 353 U. S. 151 (1957).

Plaintiffs also invoked section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, to give the district court jurisdiction to review the "agency action" which adversely affected them. Although this statute does not of its own force require the convocation of a three-judge

court, the issues raised under it are so related to those raised under 28 U. S. C. §§1331 and 1336, that they should be decided together by this court. See *Public Service Commission* v. *Brashear Lines*, 312 U. S. 621, 625 (1941); *California Water Service Co.* v. *Redding*, 304 U. S. 252, 255-256 (1938); *Sterling* v. *Constantin*, 287 U. S. 378, 393-394 (1932).

Statutes Involved

The validity of section 13a(1) of the Interstate Commerce Act, enacted by section 5 of the Transportation Act of 1958, is involved. 72 Stat. 568, . This reads as follows:

> "A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State,

or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such dis-

continuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers."

Paragraphs (1) and (2) of section 13 of the Interstate Commerce Act, 49 U. S. C. §13(1) and (2) are also involved. They read as follows:

"(1) *Complaint to commission of violation of law by carrier; reparation; investigation.* Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) *Complaint by State commission; inquiry on commission's own motion.* Said commission shall, in like

manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Questions Presented

(1) Whether section 13a(1) of the Interstate Commerce Act, enacted by section 5 of the Transportation Act of 1958, is unconstitutional if construed to authorize the Commission to elect from case to case to permit rail or ferry service to be discontinued upon an *ex parte* application by the carrier, in avoidance of State regulation and without a hearing as to public need;

(2) Whether section 13a(1) requires the Commission to hold a hearing under the circumstances of this case, including:

(a) that there are 7,000 to 8,000 daily users of the ferry service;

(b) that there is no alternative service whatever between the termini of the ferry service sought to be discontinued;

(3) Whether the Commission acted arbitrarily in denying a hearing in express reliance on:

(a) a record in an abandonment case under section 1(18) of the Interstate Commerce Act in which the last evidence was received two years before the proposed discontinuance;

(b) a record in a fare increase case which is irrelevant to the issues of public need for the service and available alternative transportation.

(4) Whether it was the intent of Congress to deny judicial review of the action of the Commission in permitting a discontinuance of service under section 13a(1);

(5) Whether the Administrative Procedure Act required that a hearing be held;

(6) Whether section 13(2) of the Interstate Commerce Act required the Interstate Commerce Commission to hold a hearing on complaint of the State of New Jersey and its railroad commission (the Board of Public Utility Commissioners) that public convenience and necessity would not permit the discontinuance of the ferry service involved.

Statement of the Case

This case involves the identical subject matter as that in No. 41 October Term 1958 (formerly No. 838, October Term 1957), probable jurisdiction noted, *New York Central R.R.* v. *Board of Public Utility Com'rs*, 357 U. S. 917 (1958). In that case the New York Central sought to

discontinue its passenger ferry service from Weehawken, New Jersey to 42nd Street in midtown New York City and to Cortlandt Street in lower New York City as an abandonment under section 1(18) of the Interstate Commerce Act, 49 U. S. C. A. §1(18). A three-judge district court, consisting of the same three judges as the district court in the instant case, set aside a certificate by the Commission permitting the discontinuance. *Board of Public Utility Com'rs* v. *United States*, 158 F. Supp. 98 (D. N. J. 1957). The district court ruled that there was no abandonment, on the ground that the New York Central was not seeking to discontinue its freight service across the Hudson River by vessels such as car floats and lighters. Congress had, until then, vested jurisdiction in the Commission only over abandonment of all passenger and freight service on a line of railroad or portion of a line of railroad, which includes by definition a ferry connected with a railroad (49 U. S. C. A. §1(3)).

New York Central appealed that decision and this court noted probable jurisdiction on June 16, 1958, *supra*.

While that appeal was pending, on August 12, 1958, Congress enacted a new section of the Interstate Commerce Act, designated section 13a. Paragraph 1 of this section recognizes that state law may regulate interstate ferry service, which primarily affects local interests. Under the construction adopted by the majority of the district court, section 13a(1) permits the avoidance of state regulation and discontinuance of service from case to case by joint *ex parte* action of the carrier and the Commission. All that is required is that the carrier notify the Commission, the governors of the states served, and the users of the service of its intention to discontinue service. If the Commission decides not to investigate and not to hold a hearing which may result in an order requiring continuance of the

service, the service may thus be discontinued without other administrative action. According to the majority's construction, there is no requirement that the Commission find facts as a basis for its decision not to investigate, and neither states whose authority is nullified in the particular case nor users of the service may have judicial review of the merits of the decision by the Commission not to investigate. (Circuit Judge McLaughlin, dissenting, would have held that section 13a(1) did not repeal states' right to a hearing under section 13(2) and that if it did, the constitutionality of section 13a(1) would be gravely in question.)

On August 13 the New York Central notified the Commission, the Governors of New York and New Jersey, and the users of its intent to discontinue all passenger ferry service from Weehawken, New Jersey to 42nd Street (a distance of one mile) and Cortlandt Street (a distance of 4.5 miles) on September 13, leaving the users with no transportation whatsoever from Weehawken to New York. The dissenting opinion of Circuit Judge McLaughlin noted that the elimination of the ferry service would be "without one slight gesture of adequate substitution [substitute?] means of travel to the people who have become dependent on the service through the years." App. B, p. 64. No clearer indication of the void which would result from the discontinuance may be found than the Commission's ruling in the section 1(18) abandonment case that the effective date of the certificate be delayed for 90 days to allow "any governmental * * * body a reasonable period to supply an alternative means of crossing the Hudson River, if any plan should be contemplated * * *." *New York Central R. Co. Ferry Abandonment*, 295 I.C.C. 519 (1957).

State and Board filed a complaint with the Commission pointing out the complete lack of alternate transportation

and calling on Commission to hold a hearing on the questions of public need and convenience. (Quoted in dissenting opinion, App. B, p. 59). A complaint to the Commission was also filed by various political subdivisions of New York and New Jersey served by the West Shore Division, which has the ferry connection between Weehawken and New York, and by an association of users of the service (all of whom later became plaintiffs-intervenors in the district court, see 28 U. S. C. §2323). Even before these complaints were received, on August 26 the Commission released what it denominated a "Notice" stating:

> "The Commission, upon consideration of the matters involved, including consideration of the records in Finance Docket No. 18781 (*New York Central R. Co. Ferry Abandonment*, 295 ICC 385 and 519) and Docket No. 32359 (*Fares and Charges via Weehawken Ferry*), has concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued, in whole or in part."

Neither of the proceedings referred to by the Commission affords a basis for concluding that public need and the welfare of interstate commerce would permit this discontinuance.

New York Central R. Co. Ferry Abandonment later resulted in a three-judge court holding that the Commission had no jurisdiction over the discontinuance under section 1(18), *Board of Public Utility Com'rs* v. *United States*, *supra*, probable jurisdiction noted *sub nom. New York Central R.R.* v. *Board of Public Utility Com'rs*, *supra*. Although not reaching the merits of the question of public need in that case, the same district court as the present one stated in an unanimous opinion:

> "* * * [W]e have serious doubts of the adequacy of the findings of fact and of their support by substantial evidence, but because of the definitive conclusion of lack of jurisdiction we do not pass upon the point at this time." 158 F. Supp. at 103.

Thus the Commission's findings there that public convenience and need would permit the discontinuance, while continuance would unduly burden interstate commerce, were seriously questioned by a unanimous three-judge court after the issues had been fully litigated. Moreover the last evidence was received in that case more than two years before the proposed discontinuance under section 13a(1). At the hearing below plaintiffs offered to prove that reduction of train service connecting with the ferry, removal of twenty miles of track and other economies had substantially altered the carrier's plight. New York Central has pending before the Commission an application for a substantial fare increase. Circuit Judge McLaughlin in dissenting, on an issue not controverted by the majority, stated:

> "Currently changed conditions are the fact." App. B, p. 64.

The record in the section 1(18) abandonment case does not warrant the Commission's *ex parte* ruling that no investigation need be held on the issues raised by the section 13a notice of discontinuance, in the face of the district court's reservations as to its adequacy and of the changed circumstances.

Fares and Charges via Weehawken Ferry, referred to by the Commission in its "Notice", presupposed that as a result of the construction of section 1(18) by the district court that the ferry service must be continued. No question of the existence or adequacy of alternative service be-

tween the termini of the ferry was raised or germane to this fare increase proceeding.

After the complaints objecting to the discontinuance under section 13a were received by the Commission, on September 2 it issued what was styled an "Order" reaffirming its previous stand expressed in its August 26 "Notice". On September 4, State and Board commenced an action before a three-judge district court challenging New York Central's right to discontinue the ferry service pursuant to the notices under section 13a on the grounds that State and Board had a statutory right to a hearing before the Commission or that if section 13a was construed to deprive them of a hearing it was unconstitutional. The municipalities and counties of New York and New Jersey and the users association which had complained to the Commission obtained leave to intervene as plaintiffs and file a complaint. See 28 U. S. C. §2323. The district court by a unanimous vote on September 12 granted a preliminary injunction restraining New York Central from discontinuing the service. See 28 U. S. C. §2324. On October 6 Circuit Justice BRENNAN denied a motion by New York Central dated September 29 pursuant to Rules 50 and 51 of this court to stay the preliminary injunction. After final hearing on November 3, the district court held by a 2 to 1 vote that New York Central might discontinue the ferry service. The final judgment was not signed until December 4. The District Court simultaneously (by a 2 to 1 vote) issued an order staying the final judgment pending an appeal to this court. As a result, the preliminary injunction on discontinuance remains in effect pending the determination.

On December 19, 1958 State and Board filed and served its notice of appeal to this court. On December 31, 1958 plaintiffs-intervenors filed and served their notice of appeal to this court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introduction

The State and Board do not challenge the right of Congress to regulate in the instant case and to provide for a definitive national transportation policy. At issue is the method by which Congress has acted according to the interpretation given section 13a(1) by the District Court and urged by the Commission and the Railroad.

Section 13a(1), in effect, removes from the states the exclusive right to regulate curtailment of service. *Board of Public Utility Com'rs* v. *United States, supra.* The Commission now has the same jurisdictional power as it has been exercising over railroad abandonments under section 1(18). Section 13a(1) expressly provides for application by the railroad to curtail. This is followed by an investigation upon notice and hearing and determination. The Commission, the Railroad and the District Court, however, did not view section 13a(1) in that context. Instead, the court by a 2-1 majority developed a novel concept of administrative action in the transportation field, which the appellants urge to be erroneous and without any foundation. Said the court:

> "* * * the congressional power over interstate commerce has been wielded directly instead of being delegated for exercise by the Commission. * * * Congress has clearly disclosed its intention that a carrier subject to the Act, of its own initiative and without any prior authorization either by Congress or by the Commission, might discontinue a ferry or any portion of its service operated in interstate commerce upon the expiration of thirty days after the filing, service and posting of a written notice of its intention so to do. This legislative delegation of authority to discontinue

is expressly unconditionalized by the phrase 'the laws or constitution of any State or the decision or order of or the pendency of any proceeding before any court or State authority to the contrary notwithstanding.' " App. A, p. 43.

The court went on to state that:

"Since Congress, by virtue of its constitutionally vested exclusive and plenary power over interstate commerce, could have always exercised it without employing the intermediary of a Commission, it can still exercise that power directly by legislative mandate without channeling such exercise through the commission. *Southern Pacific Co.* v. *Arizona*, 1945, 325 U. S. 761, 769." App. A., p. 44.

* * *

"When Congress enacted Section 13a(1) the rights of plaintiffs-intervenors [Co. of Bergen et al.] as well as those of the original plaintiffs [State of N. J. et al.] became conditional licenses subject to termination through the invocation by the carrier of the procedure prescribed therein." App. A, p. 54.

If this interpretation is correct, the clear terms of section 13a(1) providing for a procedure for curtailment only after investigation and hearing are violated, the intent of the Interstate Commerce Act as a whole, to which this section is a supplement, is thwarted, and the rights and interests of the State, through its agencies and on behalf of the users of the instant service, are denied and shunted aside. See *Yonkers* v. *United States*, 320 U. S. 685, 691, 692 (1943); *Colorado* v. *United States*, 271 U. S. 153 (1925).

New Jersey is not asserting that Congress has invalidly taken away its historic right to regulate ferry service across the Hudson River by the Transportation Act of

1958. It disagrees emphatically, however, with the District Court's holding that section 13a(1) confers upon both the carrier and the Commission the authority to eliminate such ferry service by joint *ex parte* action unchallengeable by the State or the users of the service.

According to the holding below, the State would be precluded by the terms of section 13a(1) from taking any further measures to protect its interest in transportation policy and the interests of the users of the ferry service. The rights of the latter to the continuance of the ferry service, according to the District Court, "* * * were created by, and must be deemed to have been terminated with, the jurisdiction of the plaintiff Board which concededly existed prior to the adoption of section 13a(1)."

The State and the Board are seeking the right to be heard, to present evidence, and to rebut, if necessary, facts presented by an applying carrier which seeks to curtail or discontinue service under section 13a(1). In the instant case the means of some 8000 commuters to reach their place of earning a livelihood are at stake. Under basic principles of fair play, there should be a right to be heard by the Commission on the public need for the service and the lack of adequate substitute service. Complaint can be made but, if disregarded, the Commission within thirty days can drastically alter the commuter's way of life under the ultimate power placed both in the carrier and the Commission by the three-judge court below. The admitted reliance on a two-year old hearing as the basis for allowing discontinuance of the ferries without any consideration of important facts pertaining to changes since the former hearing is proof positive of the untenable result reached by the District Court. Leaving to the Commission an unchecked discretion not to conduct a statutory investigation and hearing is contrary to the express terms of section 13a(1) and violates fundamental concepts of justice safeguarded by the Fifth Amendment.

A. Whether section 13a(1) is constitutional.

In enacting section 13a Congress has not attempted to exclude totally state substantive regulation of interstate train and ferry service affected with a local interest. There is no complete preemption by federal law; carriers are not freed from all public regulation in every case. By its terms section 13a(1) provides for the supersession of state substantive law by federal law only on a condition which may or may not happen from case to case.

> "The provisions of this paragraph shall not supersede the laws of any state or the orders or regulations of any administrative or regulatory body of any state applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission."

That state law would apply to the ferry in question were it not for federal exclusion is strongly suggested by the majority in the district court. "It was our recognition of the persistence of State authority until excluded from the field by congressional enactment that brought us to our conclusion in the previous litigation in these matters [holding that discontinuance of the ferry service was not authorized under section 1(18)]." App. A, p. 42.

Under the construction of the majority of the district court, state law may be avoided by the notice under section 13a(1), and all public regulation may be avoided if the Commission decides, from case to case, without making any findings of fact, not to investigate and hold a hearing. The net effect of this two-step *ex parte* action is to oust the State's power to regulate on a case by case basis. This is clearly adjudicatory action. Due process of law requires that the state be apprised of the evidential basis for the ouster of its power in a particular case, be given an oppor-

tunity to meet it, and afforded findings of fact upon which the action is premised. In *Missouri* v. *Holland*, 252 U. S. 416 (1920), this Court held that the deprivation of a governmental power of a state in a particular case by operation of federal law was sufficient to create a justiciable controversy.

A due process right to a hearing before interests may be cut off by adjudication is not restricted to cases where either an immediate property right or personal liberty is affected. It is sufficient that a legally protected interest is invaded. This interest may derive its legal significance either from the Constitution, from a statute or from the common law.

Although there is no property right in government employment, it was recently held that a school board is required to afford procedural due process to a teacher whom it proposes to discharge. *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 555 (1956). In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951), it was acknowledged that the appellant organizations were not deprived of life, liberty or property by being placed on the Attorney General's subversive list. 341 U. S. at 164. They nevertheless were entitled by due process to a hearing because labeling them as Communist invaded their common law right to be free from defamation. 341 U. S. at 139, 160. See also *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940).

In *Harmon* v. *Brucker*, 355 U. S. 579 (1958), this court recently recognized that an individual was protected by due process of law against arbitrary action by the Department of Defense in issuing him a discharge other than "honorable". This opinion is significant on the jurisdictional issue in the instant case. Despite the apparent statutory exclusion of any judicial review, the Court in its *per curiam* opinion stated:

"* * * Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 108, 23 S. Ct. 33, 38, 47 L. Ed. 90; Philadelphia Co. v. Stimson, 223 U. S. 605, 621-622, 32 S. Ct. 340, 345, 56 L. Ed. 570; Stark v. Wickard, 321 U. S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 733. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us. judicial relief from this illegality would be available. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries. Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 159, 160, 71 S. Ct. 624, 642, 95 L. Ed. 817, and see Army Regulation 615-360, par. (7)."

Both the State of New Jersey and the users of the service have a legally protected interest in ferry service required by the public convenience and necessity. This legally protected interest is derived from the needs of the public for the transportation. The State not only has a right but it has a pressing duty to do all in its power to effectuate the continuation of services essential to the health and safety of the public. *Van Riper* v. *Traffic Tel. Workers*, 2 N. J. 335, 345, 346 (1949). Before the New York Central can cut off this essential ferry service to 8000 commuters, it should be required to establish a burden on interstate commerce, a lack of public need and adequate substitute means of transportation at a hearing subject to cross-examination by objectors.

The public interest in continued ferry operation stems also from franchises granted by the State for the railroads to establish and maintain a ferry service. The Weehawken ferry of the New York Central originated with franchises granted by special acts of the New Jersey legislature. L. 1852 c. 168, p. 401; L. 1871 c. 290, p. 711.

The franchises are contracts between their owners and the State of New Jersey. The owners of the franchises undertook an obligation to operate ferry service sufficient to meet the demands of public convenience and necessity. *Elizabethtown Water Co.* v. *Board of Public Utility Com'rs*, 27 N. J. 192, 196 (1958); *Penna-Reading S. S. Lines* v. *Board of Public Utility Com'rs*, 5 N. J. 114 (1950); *In re Central R.R.*, 43 N. J. Super. 13, 22 (App. Div. 1956). In *Ches. & Ohio Ry.* v. *Public Service Comm.*, 242 U. S. 603, 607 (1917), it was said:

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained."

Every legal duty has a reciprocal right. The other party to the franchise contract is plaintiff, the State of New Jersey. Under state law the franchise rights of the State are enforced by plaintiff, the Board of Public Utility Commissioners. The users of the service have common law rights in the service as third party beneficiaries of the franchise contracts.

Congress itself has recognized the strong interest of the states in the ferry service. The National Transportation Policy expressly requires the Commission "to cooperate with the several states and the duly authorized officials thereof * * *". The new section 13a requires the carriers

to notify the governors of the states in which the ferry is operated of proposed service curtailments. This notice, the notice to the users of the service, and the complaint procedure of the statute demonstrate that the ferry service vitally affects interests fully warranting legal recognition and constitutional protection.

B. Whether sections 13a(1) and 13 require a hearing upon notice prior to an ultimate determination authorizing curtailment.

Congress acting pursuant to Art. 1, par. 8, clause 3 of the Constitution has occupied a field formerly reserved by Congressional non-action to the several states. *Board of Public Utility Com'rs* v. *United States, supra.*

By its terms section 13a(1) permits carriers to file a notice is given to the governor of each state affected by mail at least thirty days prior to the action it seeks to take. Notice is given to the Governor of each state affected by mail and to users by posting of the notices. The Commission during the thirty-day period is empowered to enter into an investigation instigated by "complaint" or upon its own initiative. Upon the "institution of such investigation" the Commission upon 10 days notice to the carrier proposing discontinuance may in its own discretion order the carrier to continue service for a period of up to four months beyond the original thirty-day period contemplated by the notice. If a complaint has been filed, or if the commission has seen fit to make its own investigation, a hearing must be held before a discontinuance or change becomes effective. That, in turn, depends on findings that (1) the operation or service is required by public convenience and necessity, and (2) continued operation will not unduly burden interstate commerce.

The District Court held otherwise and in effect regarded a key portion of this section which stated that:

> "* * * Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed notice or change. * * *"

to confer upon the railroads a direct right to curtail or discontinue service, without investigation by the Commission or hearing at which users of the service could present independent or rebutting evidence. The decision by the Commission not to investigate or hold a hearing, according to District Court, is entirely discretionary, not subject to any hearing and non-reviewable.

Such a construction, we maintain urgently, requires review by this Court. It is erroneous under the clear terms of section 13a(1). Section 13a(1) vests no discretion to withhold a statutory investigation once a complaint has been filed. The language of the Act expressly deals with the institution of an "investigation" by the Commission upon the filing of the complaint or upon the decision to take action on its own initiative.

The use of the phrase "shall have authority" has special meaning in light of statutory history. It by no means extends any discretion on the Commission not to take action despite the filing of a complaint. Rather, the particular terms are designed to preempt the field formerly occupied by the States. *Board of Pub. Utility Comm'rs* v. *United States, supra.* Judicial principles require that Congressional assumption of a particular legislative field formerly left to the States must be explicit. *Texas* v. *Eastern Texas R.R. Co.*, 258 U. S. 204, 218 (1921); *Yonkers* v. *United States, supra.*

The language of section 13a(1) as to the holding of a hearing by the Commission on complaint should be con-

strued as mandatory, in accordance with the construction of the parallel provision of section 15(7) of the Interstate Commerce Act dealing with the holding of a hearing by the Commission on the legality of new rates. In *Kenny* v. *United States*, 103 F. Supp. 971, 977 (D. N. J. 1952), the Court construed section 15(7) as follows:

> "The statute clearly contemplates that the interested parties, both the carrier and the protestants, shall be afforded an adequate opportunity to be heard on the merits of the controversy * * *."

Comparison of the language of section 15(7) with that of section 13a(1) makes the parallel clear. Section 15(7) provides that, whenever a new schedule of rates is filed, the Commission:

> "* * * shall have * * * authority, either upon complaint or upon its own initiative without complaint * * * to enter upon a hearing * * *."

Section 13a(1) provides that whenever a carrier files a notice that it will discontinue ferry or train service, the Commission:

> "* * * * shall have authority * * * either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance * * *."

Section 15(7) deals with new individual and joint rates. Carriers under that section file schedules whereupon within a specified period of time upon complaint or on the Commission's own initiative a hearing upon notice is held and determination made. Pending the hearing and ultimate outcome, the Commission has the power in its absolute discretion to order a suspension of rates which, if no such

interlocutory order is issued, go into effect immediately. A stop order or suspension of this type is not subject to a hearing as to its merits and non-reviewable. *M. C. Kiser Co.* v. *Central of Georgia Rwy. Co.*, 236 Fed. 573 (S. D. Ga. 1916); *Carlsen* v. *U. S.*, 107 Fed. Supp. 398 (S. D. N. Y. 1952), a case construing 49 U.S.C. §216(g) dealing with Motor Carrier Tariffs which the Court noted paralleled section 15(7). *Accord, Manhattan Transit Co.* v. *U. S.*, 24 F. Supp. 174 (N. D. Mass. 1938); *Algoma Coal & Coke Co.* v. *U. S.*, 11 F. Supp. 487 (N. D. Ala. 1935).

Section 15(7), as outlined above, section 15(1) dealing with complaints against existing rates charged by carriers, as well as section 1 (18), (19), governing the issuance of certificates of acquisition or abandonment, all deal with basic rights afforded carriers under the Act. These sections confer a power by the Commission to disturb, curtail or otherwise affect the rights of other parties, including competitors and above all the State and the users of the facilities of the carrier. In each instance final action cannot be taken without a hearing at which all interested parties may avail themselves of the opportunity to present evidence or to rebut evidence advanced by an applicant carrier. In each instance procedural safeguards consistent with constitutional requirements exist, hearing before determination and review by courts of the record. As to the requirement of such protection in rate-making cases, see *Interstate Commerce Comm.* v. *Louisville & N. Ry.*, 227 U. S. 88, 91; *Atchison, T. & S. F.* v. *United States*, 284 U. S. 248, 262 (1932); *R.R. Comm. of California* v. *Pac. G. & E. Co.*, 302 U. S. 388, 393 (1938); *Ohio Bell Tel. Co.* v. *Pub. Utilities Com. of Ohio*, 301 U. S. 292, 304 (1937); *The Grecian*, 78 F. 2d 657, 661 (2nd Cir. 1935); *Kenny* v. *U. S.*, *supra*; cf. *Norwegian Nitrogen Products* v. *United States*, 288 U. S. 294, 319 (1933). In the *Louisville & N. Ry.* case, *supra*, the Court said:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

Both section 13a(1) and section 15(7) may be literally read as permissive and as vesting the Commission with discretion to deny a hearing. In order to render the statutes constitutional, however, they must be construed as requiring a hearing upon the filing of a complaint. *Ullman* v. *United States*, 350 U. S. 422, 433 (1956); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953).

The majority below quoted in its opinion the language in the *Kenny* case, *supra*, which construed section 15(7) to impose a duty upon the Commission to hold a hearing on every complaint. The majority refused to construe section 13a to require a hearing upon complaint despite its parallelism to section 15(7) only because section 15(7) dealt with the Commission's power "to enter upon a hearing" while section 13a(1) dealt with the power of the Commission "to enter upon an investigation." Even if the distinction between "hearing" and "investigation" were significant in the abstract, nevertheless, from a reading of the whole of section 13a(1) it is apparent that "investigation" is therein used either in apposition with "hearing" or to signify a somewhat larger proceeding, including the hearing itself, the decision, and perhaps preparation for the hearing. The Commission has power "upon

the institution of such investigation" to suspend the proposed discontinuance "pending hearing and decision in such investigation." Where the Commission concludes that the statutory standards are met, it may order continuance of service "after hearing in such investigation." Such an order to continue service is referred to as "an order by the Commission after such investigation." The expressions "after hearing in such investigation" and "after such investigation" are used interchangeably.

Thus, the distinction attempted by the majority below between the language of sections 13a and 15(7) is insubstantial and no sound reason appears for failing to follow the *Kenny* case and other numerous authorities in construing section 13a.

In no instance can authority be found to support the reasoning of the District Court on the right of the Commission to take the *ex parte* action which has been read into section 13a(1). It is hard to conceive of such a result when the Transportation Act of 1920 to which section 13a(1) is a supplement expressly contemplates that besides taking into consideration economic conditions of carriers, as well as other specific criteria, the national transportation policy contemplates cooperation between the Commission and the several states with the object of preserving a national transportation policy. Local interests play a vital role in determining that policy. In *Colorado v. United States, supra,* which dealt with an abandonment proceeding under section 1(18), *et seq.,* this Court stated at page 167 that:

> "As every projected abandonment of any part of a railroad engaged in both interstate and intrastate commerce may conceivably involve a conflict between state and national interests, the consent of the Commission must be obtained by the railroad in every case. To ensure due consideration of the local interests, Con-

gress provided that a copy of every application must be promptly filed with the Governor of the State directly affected, that notice of the application must be published in some local newspaper, and that the appropriate state authorities should have 'the right to make before the Commission such representations as they may deem just and proper for preserving the rights and interests of their people and the States, respectively, involved in such proceedings.' In practice, representatives of state regulatory bodies sit, sometimes, with the representatives of the Commission at hearings upon the application for a certificate. Occasionally, the Commission leaves the preliminary enquiry to the state body. And always consideration is given by the Commission to the representations of the state authorities."

If it is assumed contrary to the appellant's argument, that section 13a(1) does not expressly afford an opportunity to be heard prior to ultimate Commission action, section 13 of the Interstate Commerce Act, to which section 13a(1) is a supplement, affords interested parties the right to a hearing upon the filing of a complaint.

Section 13 of the Interstate Commerce Act deals with the power and duty of the Commission to initiate investigatory action. This section has general applicability to the entire chapter. It is the only section specifically dealing with the power and duty of the Commission at the threshold of a matter presented to it. Various other sections deal with the power and duty of the Commission to take action after a hearing has in fact been held.

Section 13 contains standards for the exercise of discretion whether or not to initiate an investigation. An investigation must be undertaken except where there is no rea-

sonable basis for the complaint. No complaint may be dismissed for lack of direct injury to the complainant. Under section 13(2) a state has a broad right to initiate complaints. *United States* v. *New York Central R.R.*, 272 U. S. 451 (1926).

Section 13a(1) does not repeal the express applicability of section 13 to the entire chapter, although it recites that the Commission shall have discretion to initiate an investigation. This is consistent with the applicability of section 13 which includes the standards referred to. Thus, sections 13 and 13a(1) may be read together with perfect consistency and yet, still afford a great measure of relief to railroads. The majority reasoned that to carry out the admitted congressional purpose of affording substantial relief to railroads from the burden of uneconomical services, section 13a(1) had to be read as an implied partial repeal of section 13, vesting in the Commission an absolutely uncontrolled discretion to permit the cessation of services by carriers. This is an unwarranted conclusion. The railroads under any reading of section 13a(1) are given a new forum, the Interstate Commerce Commission, rather than state agencies. Much of the railroads' complaints in the past have been directed toward an alleged overconcern with local interests entertained by state agencies. The railroads may still obtain substantial relief if under section 13 the Commission has a duty to investigate where there is reasonable ground for a complaint and yet has discretion to permit the discontinuance of service at the close of a hearing.

C. Whether the "Notice" and "Order" of the Commission were orders within the meaning of statutes giving plaintiffs a right to judicial review.

The majority held that the documents issued by the Commission on August 26 and September 2, 1958 and denomi-

nated by the Commission as "Notice" and "Order", respectively, were not orders within the meaning of the statutes discussed in *Jurisdiction, supra,* which afford plaintiffs a right to judicial review. In adopting this view, the majority retreated to the now discredited negative order doctrine. In commenting on the cases setting out the negative order doctrine, Professor Davis has said that: "The proposition that a mere declaration of rights or a determination of status is not reviewable * * * is clearly not now the law." *Davis, Administrative Law,* §196 at 654 (1951). The negative order doctrine was put to rest in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939), which held that the pragmatic effect of what was done by the administrative agency must be examined to determine whether or not an "order" is involved. See also *Frozen Food Express* v. *United States,* 351 U. S. 40, 44 (1956). In this case the action of the Commission, however denominated and however evidenced, would have allowed the New York Central, except for the court challenge, to shut down the Weehawken ferry.

D. Whether the Commission committed an abuse of discretion by failing to investigate.

Even where matters are committed to the discretion of an agency, judicial review may be had where that discretion is exercised unreasonably. *Harmon* v. *Brucker, supra.* In *Dixie Carriers* v. *United States,* 143 F. Supp. 844 (S. D. Tex. 1956), *Long Island R. R.* v. *United States,* 140 F. Supp. 823 (E. D. N. Y. 1956), and *Amarillo-Borger Exp., Inc.* v. *United States,* 138 F. Supp. 411 (N. D. Tex. 1956), three-judge courts held that it was an abuse of discretion for the Interstate Commerce Commission to vacate a suspension order without any justification beyond a mere recitation that good cause had been shown.

This case presents a situation analogous to those. The serious doubt cast by the district court on the Commission's findings in the prior abandonment case (*Board of Public Utility Com'rs* v. *United States, supra*), that discontinuance of this service is warranted by lack of public need and the welfare of interstate commerce is analogous to the original determinations in the *Dixie Carriers, Long Island* and *Amarillo-Borger* cases that new tariffs should be suspended as an exercised discretion under section 15(7) of the Act, 49 U.S.C. §15(7). The ultimate conclusions without more in the "notice" and "order" of the Commission in this case present close parallels to the Commission's vacation in the *Dixie Carriers, Long Island* and *Amarillo-Borger* cases of the suspension orders based on a mere finding of "good cause". The courts held the vacations without foundation in the light of the original determination that the public interest required suspension. Similarly, the conclusion to permit the discontinuance without hearing and findings of fact should be held an abuse of discretion in the light of the grave challenge by the three-judge court to the Commission's prior determination that discontinuance was in the public interest.

In a recent unreported case following the *Dixie Carriers, Long Island* and *Amarillo-Borger* cases, the court stated:

> "The fatal deficiency here is the lack of an opportunity for the protestants to be heard before the action was taken by the Commission. It is our view that * * * the interested parties should be afforded an opportunity to reply to the petition seeking a reconsideration of the order of suspension. Only in this way can the Commission have before it such facts as may be in possession of the interested parties bearing upon the propriety of vacating the suspension order pre-

viously issued." Atlantic C. L. R.R. v. United States, No. 2794, E. D. Va. Nov. 5, 1958.

In addition to the district court's questioning of the Commission's finding in the abandonment case, other factors indicate that the Commission's refusal to hold a hearing was an abuse of whatever discretion it has under the statutes. The two dockets referred to by the Commission as matters which it considered lend no reasonable support to the conclusion. The abandonment docket included evidence on the issue of public need for the ferry service in question, but the last evidence dealt with a period over two years before the present action of the Commission. Conditions had changed substantially by the time of the proposed discontinuance. See discussion in *Statement of Case, supra*, p. 12. Plaintiffs filed affidavits with the Commission establishing the changed circumstances. The other matter considered by the Commission, the fare increase case, assumed that the service was to continue, and therefore, did not consider and is in no way germane to the issue of the existence or adequacy of alternative service between the termini of the ferry service, Weehawken and Manhattan.

CONCLUSION

The National Transportation Act of 1958 affects all train and ferry service throughout the country, not only the ferry service across the Hudson River. According to the District Court, if a nationwide rail system should file notice with the Commission and the Commission should decide *ex parte* not to investigate or hold a hearing, after thirty days the nationwide rail system could shut down, without any right of review or challenge at any time or in any forum by the states through which the railroad passes or by the users of the service.

Because of the substantial and important questions raised by the construction and application of new section 13a(1) of the Interstate Commerce Act, as it affects not only users and carriers but also the long recognized right of states and state railroad commissions to initiate hearings by complaint to the Interstate Commerce Commission, it is respectfully urged that this Court note probable jurisdiction.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION, No. 1002-58

STATE OF NEW JERSEY and BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,

Plaintiffs-Appellants,

and

COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; the BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD and the TOWNSHIP OF TEANECK; and the CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association,

Plaintiffs-Intervenors-Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Respondents.

Before:

McLAUGHLIN, *Cir. J.*,
WILLIAM F. SMITH, *D. J.* and
WORTENDYKE, *D. J.*

The opinion of the court was delivered by
WORTENDYKE, *D. J.*

Appendix A

A branch line, commonly known as the West Shore Line, of the New York Central Railroad Company (Central) transports commuting passengers by rail and ferry between their homes in Rockland County, New York and Bergen County, New Jersey, and their places of employment in Greater New York City. The rail line of this branch terminates at Weehawken, New Jersey, which is located on the west side of the Hudson River, but the line is continued across the Hudson River to the City of New York by means of ferry boats. Central's passengers cross the river in each direction, daily, by means of the ferries. For a period of years Central has been operating these ferries, as far as the transportation of passengers is concerned, at a substantial financial loss.

In December 1954, Central made application to the Interstate Commerce Commission, pursuant to section 1(18) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, 41 Stat. 477, 49 U.S.C. 1(18) (1952), for a certificate that public convenience and necessity permitted the abandonment of its Hudson River ferries. After extended hearings, the Commission's Division 4 reported that Central was entitled to such a certificate, 295 *I.C.C.* 385, and this was affirmed by order of the full Commission on May 15, 1957. 295 *I.C.C.* 519. Before the effective date of the ferry abandonment authorized by that order the present plaintiffs, Board of Public Utility Commissioners of the State of New Jersey (Board) and the State of New Jersey (State), brought an action in this Court to review the Commission's order. *Board of Public Utility Commissioners* v. *United States*, 1957, 158 F. Supp. 98. We decided in that case that the Commission was without jurisdiction to authorize Central to discontinue its passenger ferry service from Weehawken to New York City, while continuing to operate its waterborne freight transportation

service by ferriage between the same cities. In reaching that conclusion we held that the discontinuance of passenger ferry service was not an abandonment of a portion of a line of railroad within the meaning of Section 1(18), *supra*, and therefore was beyond the power of the Commission to authorize. Cf. *Gulf M. & O. R. Co.* v. *Louisiana Public Service Commission*, D. C. La. 1954, 129 F. Supp. 250. We are told that an appeal from our decision was taken to and is still pending before the Supreme Court of the United States.

Pending that appeal the Congress enacted the Transportation Act of 1958, Pub. L. 85-625; 85th Cong., 2d Sess., 72 Stat. 568 (August 12, 1958). It is entitled "An Act to amend the Interstate Commerce Act, as amended, so as to strengthen and improve the national transportation system and for other purposes." By this new legislation there was added to the Interstate Commerce Act, inter alia, a new section designated as Section 13a.

On August 13, 1958, Central, purporting to act pursuant to paragraph (1) of the new Section 13a, filed with the Commission, mailed to the respective Governors of New York and New Jersey and posted in its depots served by the ferries a notice that the operation of these ferries for the transportation of passengers would be discontinued at 12:01 a.m. on September 13, 1958.

On August 25, 1958, Board and State filed with the Commission a formal complaint requesting that the Commission enter upon an investigation of the proposed ferry discontinuance and set the matter down for hearing. In response to this complaint the Commission gave written notice, dated August 26, 1958, that "Upon consideration of the matters involved, including consideration of the records in Finance Docket No. 18781 (N. Y. Central R. Co. Ferry Abandon-

ment, 295 I.C.C. 385 and 519) and Docket No. 32359 (Fares and changes via Weehawken Ferry [it] has concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued, in whole or in part."

On September 4, 1958 the present action was instituted, invoking the same jurisdiction as that relied upon in the action to review the Commission's order of May 15, 1957, and additionally that claimed to be conferred by Title 28, U.S.C. §§ 1331 and 2282. Plaintiffs now seek a declaration that this new Section 13a(1) of the Interstate Commerce Act is unconstitutional, that its operation be enjoined, that Central be enjoined from discontinuing its Weehawken-New York ferry service and that the Commission's notice of August 26, 1958 and its order of September 2, 1958, be set aside.[1] Plaintiffs further pray that, if Section 13a(1) be declared constitutional, the Commission be directed to enter upon an investigation of the complaint filed by State and Board respecting the ferry discontinuance, and that Central be ordered to continue the operation of the ferry service pending hearing and decision by the Commission.

Upon due application we granted to the plaintiffs a preliminary injunction on September 12, 1958, having previously allowed the intervention, as plaintiffs, of County of Bergen, State of New Jersey; County of Rockland, State of New York; the Boroughs of Bergenfield, Bogota, Du-

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[1] The Commission order of September 2 provided that an investigation of the proposed discontinuance of ferry operations be instituted under the provisions of §13a(1) of the Interstate Commerce Act "solely to determine the conditions, if any, which should be imposed for the protection of employees affected thereby"; but that petitions for reconsideration of the Commission's decision not to investigate the proposed discontinuance be, in all other respects, denied.

mont, Harrington Park, Haworth, Norwood, and the Township of Teaneck; and the Citizens United Transit Committee, an unincorporated association of New Jersey resident commuters. At the same time, the Public Service Commission of the State of New York was permitted to appear as amicus curiae. The operation of the ferries, therefore, continued. We are told that on September 29, 1958 Central applied to the Supreme Court of the United States for a stay of the Court's injunctive order of September 12, 1958 pending the final determination by the Supreme Court of an appeal therefrom, and that the application was denied by Mr. Justice Brennan on October 6, 1958.

Having duly come to issue, final hearing in the present action was held on November 3, 1958.

We recognize jurisdiction here under 28 U.S.C. § 2282 (1952), in conjunction with 28 U.S.C. § 1331 (1952).

We find no jurisdiction under 28 U.S.C. § 1336 (1952), because the action is not one to "enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." On the contrary, the plaintiffs complain of the refusal of the Commission to act, i.e., "to enter upon an investigation of the complaint" of the plaintiffs. No "order" of the Commission is here complained of. Its written notice that it would not investigate the complaint does not constitute such action as is reviewable under § 1336 *supra*. Cf. *Rochester Telephone Corp.* v. *United States*, 1939, 307 U. S. 125. As was the case in *United States* v. *Los Angeles & Salt Lake R.R. Co.*, 1927, 273 U. S. 299, 310:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything, which does not grant or with-

> hold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation * * *."

The notice given by the Commission in the present case by way of response to the plaintiffs' complaint was nothing other than an announcement that the Commission intended to take no action with respect to the railroad's notice of intention to discontinue the ferries. Section 13a(1) clearly leaves to the absolute discretion of the Commission the determination of whether or not it, upon receipt of a complaint directed against a railroad's notice of intention to discontinue service, shall make any investigation of the matter or avail itself of its temporary veto power by way of suspension within the limitations of the Act. The Act is self-implementing insofar as it affords authorization to a carrier to discontinue service. No provision is made for any action of the Commission to render such authorization effective. The efficacy of the congressional authorization is in no respect dependent upon any action on the part of the Commission. Obviously, therefore, the provisions of 28 U.S.C. § 1336 do not clothe us with jurisdiction here.

No greater jurisdictional assistance is afforded to the plaintiffs by the provisions of 5 U.S.C. § 1009 (1952), as will appear from the following critical language thereof:

"Except so far as * * * agency action is by law committed to agency discretion. (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

In the case before us the statute under review expressly commits to the discretion of the Commission the determination of whether or not it will investigate any complaint which is evoked by a carrier's notice of intention to discontinue. Plaintiffs concede that the statutory language is permissive. Therefore, since the Commission's decision to act or refrain from action was committed to its exclusive discretion, the right of review provided by Section 1009, *supra*, is, by the terms thereof, unavailable to these plaintiffs. *Panama Canal Company* v. *Grace Line, Inc.*, 1958, 356 U. S. 309. In that case the initiation of a proceeding for readjustment of Panama Canal tolls was committed, by congressional enactment, to the exclusive discretion of Panama Canal Company, an agency of and wholly owned by the United States and created by Congress for the purpose of operating and maintaining the Canal. Justice Douglas pointed out that Section 1009 excluded from judicial review thereunder agency action which had been committed by law to agency discretion and that the initiation of a proceeding for the readjustment of canal tolls was a matter which Congress had left to the discretion of the Panama Canal Company as an agent or spokesman of the President. Id. at 317. He continued:

"The case is, therefore, quite unlike the situation where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed

> action * * *. We put the matter that way since the relief sought in this action is to compel petitioner to fix new tolls. The principle at stake is no different than if mandamus were sought—a remedy long restricted, *Marbury* v. *Madison,* v *Cranch.* 137, 166; *Decatur* v. *Paulding,* 14 Pet. 497, 514-517, in the main, to situations where ministerial duties of a nondiscretionary character are involved. Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law, then judicial relief is often available * * *. But where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. (Citing inter alia *United States, ex rel Chicago G. W. R. Co.* v. *Interstate Commerce Commission,* 294 U. S. 50, 62-63.) We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision." 356 U. S. at p. 318, *supra.*

The foregoing language seems completely apposite to the factual situation with which we are here confronted. Section 13a(1) in pertinent part provides that "[u]pon the filing of such notice [of the carrier of its intention to discontinue service] the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change." The unqualified character of the discretion reposed to determine whether or not to investigate is at least as obvious in the foregoing language as in that of the Canal Zone Code authorizing the Canal Company to

prescribe and to change the canal tolls. It was in fact so construed on the Senate floor during the debate upon the Act.[2]

We are, therefore, relegated to the exercise of jurisdiction conferred upon this Court by 28 U.S.C. § 2282. In this position we are asked to restrain the operation of Section 13a(1) for repugnance to the Fifth Amendment to the Federal Constitution because, if interpreted as contended for by the defendants, it would deprive the users of the ferries of property without due process of law. Assuming for the purposes of argument that the users of these ferries have a standing to complain of their discontinuance, either directly or through the plaintiffs as their spokesman, we immediately face the constitutional question.

It is conceded that the operation of these ferries is a facility of interstate commerce, and that "Congress could oust the States of all power to regulate interstate transportation." Federal power over such commerce is derived directly from Article 1, Section 8, cl. 3 of the United States Constitution. This constitutionally bestowed power was characterized by Chief Justice Marshall in *Gibbons* v. *Ogden*, 1824, 9 Wheat. 1, at p. 86, as follows:

> "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power,

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[2] "Mr. Russell. * * * The Senator speaks about a hearing before the Interstate Commerce Commission. On the notifications which are filed with the Interstate Commerce Commission, there is no hearing, unless the Interstate Commerce Commission, within a certain period of time, determines that one should be had. Unless the Interstate Commerce Commission takes affirmative action to stop the railroad's action within a certain period of time, the railroad determines such action." 104 Cong. Rec. 9762 (June 11, 1958).

like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress though limited to specified objects, is plenary as to those objects, the power over commerce * * * among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse."

The exercise by Congress of such power over interstate commerce can only be accomplished by legislation which measures the scope of the exercise of such power. Until a particular aspect in the field of interstate commerce has been regulated by congressional enactment, the States are free to exercise their police and other governmental powers therein. *Port Richmond Ferry Co.* v. *Hudson County*, 1914, 234 U. S. 317; *Colorado* v. *United States*, 1926, 271 U. S. 153. It was our recognition of the persistence of State authority until excluded from the field by congressional enactment that brought us to our conclusion in the previous litigation in these matters. *Board of Public Utility Commissioners of New Jersey* v. *United States, supra.* The Interstate Commerce Commission was created by Congress for the purpose of receiving and administering such of the congressional power over interstate commerce as was

thereby delegated to it. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 1896, 162 U. S. 197, 211. Because by 49 U.S.C. § 1(18), *supra*, the Commission was authorized to certify that present or future public convenience and necessity permitted the abandonment of a line of railroad, including a ferry, but not a reduction or discontinuance of service upon such a line, we found that the Commission had not been empowered to authorize the discontinuance of the passenger service on the Hudson ferries while the freight service thereon was continued. Cf. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Railroad Commission of California*, 1931, 283 U. S. 380. Since we so decided, however, Congress has been heard from most emphatically and distinctly upon the subject then before us, in the language of § 5 of the Transportation Act of 1958, *supra*. By that language the congressional power over interstate commerce has been wielded directly instead of being delegated for exercise by the Commission. In that section the Congress has clearly disclosed its intention that a carrier subject to the Act, of its own initiative and without any prior authorization, either by Congress or by the Commission, might discontinue a ferry or any portion of its service operated in interstate commerce upon the expiration of thirty days after the filing, service and posting of a written notice of its intention so to do. This legislative delegation of authority to discontinue is expressly unconditionalized by the phrase "the laws or constitution of any State or the decision or order of or the pendency of any proceeding before any court or State authority to the contrary notwithstanding." At the same time, however, and in the same section, it is also provided that whenever a carrier shall avail itself of such legislative authority by indicating and publishing its intention to discontinue a service, the Commission shall have the authority, to be

exercised within the same thirty day period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance of service. If, upon such investigation the Commission finds, after hearing, that the operation of such a ferry is required by public convenience and necessity and will not unduly burden interstate commerce, it may, by order, require its continuance in whole or in part for a period not to exceed one year from the date of such order. Since Congress, by virtue of its constitutionally-vested exclusive and plenary power over interstate commerce, could always have exercised it without employing the intermediary of a Commission, it can still exercise that power directly by legislative mandate without channeling such exercise through the Commission. *Southern Pacific C* v. *Arizona,* 1945, 325 U. S. 761, 769. In the present case that is exactly what the Congress has done. It has authorized the carrier directly to discontinue service. It has not delegated to the Commission power to authorize such discontinuance, but has made such discontinuance subject to the exercise of a discretionary power by the Commission (1) to investigate the proposed discontinuance and (2) following investigation, to suspend such discontinuance after affording an opportunity to be heard to those who will be affected either by the discontinuance or by the suspension thereof. If, as we conclude, Section 13a(1) amounts to a direct authorization to a carrier subject to the Interstate Commerce Act to discontinue service, in whole or in part, of a ferry operated in interstate commerce, the constitutionality of such an Act is obvious from U. S. Const., Art. I, §8, cl. 3. *Thatcher* v. *Tennessee Gas Transmission Co.,* 5 Cir. 1950, 180 F. 2d 644, cert. den. 340 U. S. 829; *Pennsylvania R.R. Co.* v. *Public Service Commission,* 1919, 250 U. S. 566.

This Court has no right to say that Congress should not have authorized a carrier to discontinue service or have left to the unreviewable discretion of the Commission the determination of whether or not it should investigate the carrier's contemplated action as a preliminary to a hearing thereon looking to suspension thereof. We so construe the language of Section 13a(1), and as so construed, find it in no respects repugnant to the Fifth Amendment. See *Berman* v. *Parker,* 1954, 348 U. S. 26; *Luxton* v. *North River Bridge Co.,* 1894, 153 U. S. 525.

Plaintiffs' contention that Section 13a(1) "permits the Interstate Commerce Commission to supersede State regulation of ferry service" is without support in the language used. The supersession of the State regulation is not achieved by any act of the Commission, but results from the statutorily authorized action of the carrier in electing to discontinue service. The constitutionality of such legislative authorization is well established. Cf. *Thatcher* v. *Tennessee Gas Transmission Co., supra; Eastern Motor Express* v. *United States,* D.C. Ind. 1952, 103 F. Supp. 694, 702, aff'd 344 U. S. 298; *Addyston Pipe & Steel Co.* v. *United States,* 1899, 175 U. S. 211. When Congress occupies the field the State must withdraw therefrom.

Section 5 of the Transportation Act of 1958 amends "[t]he Interstate Commerce Act, as amended, * * * by inserting after section 13 thereof" the new Section 13a with which we are here principally concerned. It is argued that because Congress has directed that this new section be inserted to follow immediately Section 13 of the old Act, it intended that both sections should be read and construed together. More specifically, it is urged that the "authority" given to the Commission by Section 13a(1) "to enter upon an investigation of the proposed discontinuance * * * either upon complaint or upon its own

initiative without complaint" must be exercised in an adversary proceeding as contemplated by 49 U.S.C. § 13(2), upon complaint by a State commission "in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter." 49 U.S.C. § 13 is entitled "Complaints to and investigations by Commission." The section, however, is broken down into four subdivisions. Subdivision 1 authorizes any person, corporation, body politic or municipal corporation, or any common carrier who may have a complaint "of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof" to make it to the Interstate Commerce Commission. Thereupon the Commission is required to forward a statement of the complaint to the common carrier complained against who shall be called upon either to satisfy the complaint or to answer the same in writing. If such carrier satisfies the complaint, that terminates the proceeding. If it fails to satisfy the complaint within the time specified by the Commission "or there shall appear to be any reasonable ground for investigating said complaint" the duty to investigate is imposed upon the Commission. It will be noted that the basis for complaint is limited to an act or omission of a common carrier in contravention of the provisions of the chapter. Obviously the language of this first subdivision can have no application to our presently confronting situation, since what the defendant carrier has done here is not in contravention of the provisions of the chapter as amended by the addition of Section 13a(1). Subdivision 2 of Section 13

is closely related to subdivision 1 thereof and relates to the same type of complaint and a similar basis therefor, but the maker of the complaint contemplated by subdivision 2 is "the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission." Subdivisions 3 and 4 are obviously equally inapplicable to the facts in the case before us. The mere juxtaposition of Section 13a(1) to Section 13 is of no significance where the language of the new section requires no construction, and where the subject matter thereof is independent of and unrelated to the former. The situations contemplated by Section 13 are entirely distinct from those contemplated by Section 13a(1). The procedure prescribed for each category of situation is therefore appropriately different. The new legislation expressly authorizes the noticing carrier to discontinue the service described in the notice "except as otherwise ordered by the Commission pursuant to this paragraph, * * *." The authority of the Commission to investigate within the thirty days' period becomes effective upon the filing of the notice of discontinuance by the carrier. There is no compulsive directive that such an investigation shall be made, although the authority to make it exists irrespective of a complaint, because it may be exercised upon the Commission's own initiative in the absence of a complaint. It is not until the Commission institutes such an investigation that it may require the carrier to continue the service "pending hearing and decision in such investigation." The Commission may require continuance or restoration of service for a maximum period of one year only when it finds "after hearing in such investigation" that the service "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce." The

patent difference between the situations and procedures contemplated and prescribed in old Section 13 and new Section 13a(1) eliminates any ground for a similarity of treatment.

It is further argued by plaintiffs that the similarity of the language of Section 13a(1) to that of 49 U.S.C. § 15(7) (1952), requires a similar construction of each section with respect to the Commission's duty to accord a hearing upon the complaint of a party adversely affected by the action in contemplation. Section 15(7) expressly confers and imposes upon the Commission the power and duty to determine the lawfulness of new rates adopted by a carrier. It provides, in pertinent part, that when a carrier files a new rate schedule with the Commission, the latter "shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate * * *." In *Kenny* v. *United States*, D. C. N. J. 1952, 103 F. Supp. 971, Judge Smith of this Court construed Section 15(7) as contemplating "that the interested parties, both the carrier and protestants, shall be afforded an adequate opportunity to be heard on the merits of the controversy," i.e., whether the proposed rates were reasonable, just and lawful as the Commission elsewhere in Section 15 was authorized and directed to determine. Judge Smith further pointed out in the same case that:

> "The statute reserves to the carrier a primary right to establish tariffs but vests in the Commission the authority to determine their 'lawfulness.' * * * The burden is upon the carrier to prove not only that the proposed tariffs are 'just and reasonable' but also that

they are lawful. * * * A tariff initiated by the carrier pursuant to the provisions of the Act 'must be upheld as lawful unless adequate reasons are prescribed for setting it aside.'" (Citing *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.) 103 F. Supp. at 974, *supra.*

The significant phrase in Section 15(7) is "to enter upon a hearing." Section 13a(1) on the other hand authorizes the Commission "to enter upon an investigation" and thereafter to hold a hearing to determine whether the ferry shall be continued in operation. The making of the investigation is left entirely to the discretion of the Commission; the holding of a hearing is required only after the institution of such an investigation.

The due process requirements of a hearing to determine the reasonableness and lawfulness of a proposed change in carrier rates apply by reason of the involvement in such a proceeding of substantial rights or property, both of the carriers on the one hand and of their patrons on the other. The discontinuance of service by a carrier pursuant to the direct congressional authorization embodied in Section 13a(1) poses no threat to life, liberty or property. Neither the exercise of such authorization by the carrier nor the Commission's determination not to investigate the proposed discontinuance can impair the rights, under the Fifth Amendment, either of the State of New Jersey, its Board of Public Utility Commissioners, or the users of the service to be affected. *New York* v. *United States*, 1922, 257 U. S. 591; *Addyston Pipe & Steel Co.* v. *United States, supra. Norwegian Nitrogen Products Co.* v. *United States*, 1933, 288 U. S. 294, cited by plaintiffs in this connection, is distinguishable because the requirement of a hearing in the course of the investigation prescribed by the Tariff Act

of 1922 is an obviously essential protection to the property rights involved in the prescription of tariff duties to achieve an equalization of differences in costs of production in the United States and abroad. In such a situation a hearing is essential to the performance of the executive duty imposed by the Act.

Section 13a(1) embodies a new and distinct exercise of the congressional power. Its language is clear and unambiguous and therefore neither admits of nor requires any construction by comparison with any other section or subsection of the Interstate Commerce Act, as amended.

It may be asked what remedy, if any, is available to a party affected by a discontinuance of service under the new section if it be held that the Commission may, at its discretion, refuse to investigate such a party's complaint. There is a remedy, but it is not in this Court. It has long been recognized that the Commission may be compelled to act by a proceeding in mandamus brought in the District of Columbia, where the Commission has its theoretical domicile. *Work* v. *Rives*, 1925, 267 U. S. 175. At page 184 of the last cited case, it is stated that:

> "There is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator in such cases does not ask for a decision any particular way but only that it be made one way or the other. Such are *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, and *Interstate Commerce Commission* v. *Humboldt S.S. Co.*, 224 U. S. 474."

We find no suggestion in the present record that the Commission acted arbitrarily or capriciously in deciding

not to investigate the proposed ferry discontinuance. The Commission expressly reached its determination not to investigate the proposed discontinuance of ferry service upon "consideration of the records in Finance Docket No. 18781 (N. Y. Central R. Co. Ferry Abandonment, 295 I.C.C. 385 and 519) and Docket No. 32359 (Fares and Changes via Weehawken Ferry)". The evidence embodied in those dockets was presented in adversary proceedings before the Commission to which the plaintiffs, plaintiff-intervenors and the railroad were parties, and which extended over a period of more than two years in the course of which the issues of public convenience and necessity and effect upon interstate commerce with respect to the continued operation of the ferries were thoroughly explored. The report of the full Commission in the 1957 ferry abandonment proceedings was filed in May of that year, although this Court is not here concerned with the sufficiency of the evidence before the Commission to support its report and recommended certificate. Moreover, there has been no offer to show in this case that either the Commission or the railroad has been guilty of any violation of law or breach of duty which could cast suspicion upon the propriety of the Commission's determination to refrain from investigation of the railroad's proposed discontinuance of ferry service.

Indeed, the effort of the railroad to discontinue such service is invited by the wording of Section 13a(1) and its legislative history. Although dealing with a foreclosure of railroad property, Mr. Justice Holmes said, in *Bullock* v. *Railroad Commission of Florida*, 1921, 254 U. S. 513, at 520-21:

> "Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect

> of profitable operation in the future. *Brooks-Scanlon Co.* v. *R.R. Comm. of Louisiana*, 251 U. S. 396. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise the power of eminent domain. Suppose that a railroad company should find that its road was a failure, it could not make the State a party to a proceeding for leave to stop, and whether the State would proceed would be for the State to decide. The only remedy of the company would be to stop, and that it would have a right to do without the consent of the State if the facts were as supposed."

It was the same eminent Justice who wrote the *Brooks-Scanlon* opinion cited in the foregoing quotation.

Plaintiffs implicitly take the anomalous position in their statement that their contention accepts arguendo the railroad's position that the Interstate Commerce Commission was not required by the Constitution or by statute to grant a hearing. Such a concession destroys the foundation for the point argued. Having concluded that a hearing was not required either by the terms of the statute or under the Constitution, the denial of such a hearing could not be arbitrary or an abuse of discretion. We do not recognize that this Court is presently called upon to determine whether the proposed ferry discontinuance finds justification in public convenience or necessity, or is in furtherance of the well-being of interstate commerce. We are confronted here by a strictly constitutional question, i.e., whether Section 13a(1) requires the Interstate Commerce Commission to hold a hearing before determining not to investigate the complaint of the plaintiff Board, and whether, in dispensing with such a hearing and concluding

not to investigate, the plaintiffs' constitutional rights have been adversely affected. Whether the policy of Congress in adopting the new section is in accord with that disclosed in the Interstate Commerce Act before its amendment thereby is of no concern to a Court, and if the language of the amendment clearly authorizes the position taken by the Commission, previous congressional policy is irrelevant as a criterion of the propriety of such position.

The legislative history of the Transportation Act of 1958 indicates that it was the result of several years' consideration by the appropriate congressional committees in the fields of Transportation and Communications. The evidence presented in numerous hearings held during the period of such consideration disclosed, among other things, that the eastern railroads of the United States were in dire financial straits, due principally to continuing losses from passenger service, particularly in the commuter service. H. Rept. No. 1922, 85th Cong. 2d Sess. (1958), 1958 U. S. Code, Cong. and Admin. News 3220. This report explains that because discontinuance of service on a line of railroad was subject to State jurisdiction, and relief in that direction had been difficult and obstructed, the House Bill, which ultimately became the new Act, "proposed to add a new section 13a to the Act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than State commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single State." Id. at 3232.

To plaintiffs' contention that they have a legally protected interest in the ferry service which the defendant railroad seeks to discontinue, the answer is simple and brief: Any interest in such service which may have ex-

isted prior to the adoption of the Transportation Act of 1958 has been explicitly made subject to the action of a carrier authorized by Section 13a(1). The previously protected interests of the plaintiffs, if any, in the continuance of the ferry service across the Hudson River arose as a result of the State's exercise, through its Board of Public Utility Commissioners, of the authority over the ferries which existed prior to the amendment. By that amendment Congress has occupied the domain of control over such service, and thereby extinguished the jurisdiction of the plaintiff Board therein. Such congressional action not only extinguishes such Board-created rights, but also any other public rights which may have resulted from the initial grants of ferry franchises and the acceptance and user thereof by the defendant railroad and its predecessors.

With respect to the plaintiff-intervenors, although they were appropriately admitted to this litigation, their rights to the continuance of the ferry service were created by, and must be deemed to have terminated with, the jurisdiction of the plaintiff Board which concededly existed prior to the adoption of Section 13a(1). When Congress enacted Section 13a(1) the rights of the plaintiff-intervenors as well as those of the original plaintiffs became conditional licenses subject to termination through the invocation by the carrier of the procedure prescribed therein.

The temporary injunction heretofore granted in this case will be dissolved and the complaint dismissed.

Judge McLaughlin dissents.

Appendix B

[Caption omitted. Same as in Appendix A.]

McLaughlin, Cir. Judge, dissenting.

The majority opinion completely sanctions the immediate abandonment of New York Central's entire public passenger ferry service between New Jersey and New York, in operation since 1883, on the basis of a single thirty day notice of discontinuance of "all ferries across the Hudson River between Weehawken, Hudson County, New Jersey and West 42nd Street and Cortlandt Street, Borough of Manhattan, City, County and State of New York."

The notice itself is defective in substance, instead of being in strict accord with its sole statutory authority of Section 13a(1) of the Interstate Commerce Act as amended (approved Aug. 12, 1958). This, without going further, is quite enough to vitiate the attempt to eliminate the public transportation involved under Section 13a(1) but because the only possible lawful construction of the above new amendment is even more important, that will be dealt with now. The invalidity of the notice will be pointed out later.

The admitted reason for the passage of the section was our decision in Board of Public Utility Commissioners of the State of New Jersey, et al. v. United States of America, Interstate Commerce Commission, Defendants, and New York Central Railroad Company, Intervenor, 158 F. Supp. 98 (D. N. J. 1957).[1] In the effort to obtain legislation which would enable this railroad or any railroad to summarily

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[1] Statement to court by counsel for the New York Central Railroad Company at the hearing on the application in this suit for preliminary injunction: "I want to say to the Court * * * if you go back to the testimony before the committees, you'll find that this particular case was the reason for the enactment of this section."

wipe out of existence any individual train or ferry or line of trains and ferries within the reach of the amendment the all pervading effect of the immediately preceding Section 13(1) and (2) was quite apparently overlooked; in any event its authority was in nowise restricted. Section 13(1) and (2) reads:

"Complaints to and investigations by commission.

(1) Complaint to commission of violation of law by carrier; reparation; investigation. Any person, firm, corporation, company, or association, or any mercantile agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

"(2) Complaint by State commission; inquiry on commission's own motion. Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

No language could be more broad. When 13(1) speaks of a complainant filing a complaint to the Commission, it includes these complainants and their complaints. When it states that if the carrier does not satisfy the complaint it shall be the duty of the Commission to investigate the matters complained of, it covers the matters complained of in these complaints and it left the Commission with no alternative but to so investigate. Interstate Commerce Commission v. Baird, 194 U. S. 25, 39 (1 4). And under

Section 13a the Commission, irrespective of the carrier satisfying the complaint, must investigate any complaint where made by a state railroad commission as here. The Commission not only did not investigate but to the contrary, affirmatively decided "not to enter upon an investigation." And that is the hard core of the case. We are dealing, not with a rate section but with "the *general* complaint and investigation provisions of Section 13(1) and (2) * * *" as stated and emphasized by the Government and Commission in their joint brief. They cannot be eliminated. They cannot be soundly argued against. They are controlling here.

No reference is made to this palpable contretemps in the railroad brief at all. Under the circumstances that is perhaps the wisest way to handle it. The Government and the Commission first merely state that the general complaint and investigation provisions of Section 13(1) and (2) cannot be read into the specific procedural pattern of Section 13a(1). They forget for the moment that 13(1) and (2) awards complainants basic rights, not mere steps in a cause. Then they go on to make the rather unique pronouncement that "Moreover, *notwithstanding* Interstate Commerce Commission v. Baird, 194 U. S. 25 (1904), Section 13(1) requires the Commission to investigate a complaint (1) if 'there shall appear to be any reasonable ground for investigation, and in such case,' (2) 'by such means as it shall deem proper.' Thus, even if Section 13(1) is thought to bear a relation to Section 13a(1), the Commission was required to consider in the light of the provisions and purposes of Section 13a(1) whether there was 'reasonable ground' for an investigation beyond consideration of the extensive information which it already had (i.e., investigation 'by such means as it shall deem proper'). Thus viewed, as it must be by its terms, Sec-

tion 13(1) and (2) adds nothing to the Commission's admitted duty to exercise responsibly its discretionary powers under Section 13a(1)." (Emphasis supplied.)

The mandatory necessity for an investigation in every case where a complaint is filed, including those covered by Section 1, under the Baird opinion has already been gone into and Section 13(2) by its specific terms demands an investigation on every complaint filed under it.

Rounding out the chaos resulting from the determination to bar paragraphs (1) and (2) of Section 13 from their dominating position with respect to 13a(1), two pages further on the Government and Commission brief concludes as to 13a(1): "*Moreover this particular section cannot be interpreted in a vacuum. It must be viewed against the background of the entire Act.*" (Emphasis supplied.) So viewed, the 13(1) and (2) investigative measures cannot be brushed aside. The final argument of the Government and Commission on this subject, the one adopted by the majority opinion and as set out in the latter, is that "* * * the basis for complaint is limited to an act or omission of a common carrier in contravention of the provisions of the chapter. Obviously the language of this first subdivision can have no application to our presently confronting situation, since what the defendant carrier has done here is not in contravention of the provisions of the chapter as amended by the addition of Section 13a(1). Subdivision 2 of Section 13 is closely related to subdivision 1 thereof and relates to the same type of complaint and a similar basis therefor, but the maker of the compiaint contemplated by subdivision 2 is 'the railroad commissioner or railroad commission. * * * The situations contemplated by Section 13 are entirely distinct from those contemplated by the new section 13a(1).'"

The above is in effect everything urged against the applicability of 13(1) and (2). Answering it, what the car-

rier has done is in direct contravention of the provisions of the chapter as amended because despite the addition of 13a(1), paragraphs (1) and (2) of Section 13 remain and they, by their terms, cover all situations, including that contemplated by 13a(1).

In addition to the above, it should be noted that, though forced to move hurriedly by the extraordinary time pressure of 13a(1), the complainants clearly made known their fundamental grievances to the Commission. The New Jersey state and public utility complaint is not confined to 13a(1). It mentions preliminarily "That said notice was issued by defendant (New York Central Railroad) under the terms of the new Section 13a of the Interstate Commerce Act". It then goes on to say:

> "That the Commission has previously found that there are 4,000 passengers on defendant's River Division and 3,000 local ferry passengers who use the ferry service described in II above, and that to permit the discontinuance of said ferry service without public hearing and investigation would deprive the users of the ferry service of an opportunity to be heard, and would deprive them of a service for which there is no alternative. Fairness and justice require that public hearing and investigation be held to determine the question of present and future public convenience and necessity."

It prays:

> "WHEREFORE, complainants pray that defendant be required to answer the charges herein, and that the Commission enter an order requiring said ferry to be continued in operation or service, pending public hearing and investigation and a decision by the Commission as to whether present and future public conve-

nience and necessity require the continuation of said ferry service, and will not unduly burden interstate commerce, and that such other and further order or orders be made as the Commission may consider proper in the premises."

And the complaint in this cause, filed within a few days thereafter (Sept. 4, 1958) by New Jersey and its Public Utility Commission, inter alia, charged "*The Commission is obligated by law, particularly by* 49 *U.S.C.* 13(2), *to investigate any complaint filed with it by the railroad regulatory agency of a state.*" (Emphasis supplied.)

Nor did the complaint filed with the Commission by the intervenor plaintiffs accept 13a(1). It protested that abandonment of the ferry system was still subject to Section 1(18) of the Act which like 13(1) and (2) had not been repealed. It strongly insisted that material changes in ferry service and rates had lately occurred and needed scrutiny on the issue of public convenience and necessity. Attacking the specific method employed by the railroad under 13a(1), it stressed the invalidity of its notice and consequently the abortive character of the proceeding. It detailed a series of constitutional objections both to 13a(1) and to what had happened under the cloak of following its directives. Lastly, it prayed for an investigation and a hearing as to whether public convenience and necessity permit the discontinuance of the ferries and whether their continuance would unduly burden interstate commerce.[2]

---

[2] The majority opinion discourses at some length on the non applicability of Section 15(7) since that is directly related to rates and cites Kenny v. United States, 103 F. Supp. 971 (D. N. J. 1952). That section was referred to by plaintiffs as showing similarity of treatment (which it does) with the conclusion that the language of 13a(1) was probably to a large extent adapted from 15(7). A reading of the two sections tends to confirm this thought.

(Continued on following page)

The net result of all of the above is that Section 13 of the Interstate Commerce Act, granting reasonable protection to states and citizens against the sort of power play revealed in this litigation, still stands and still beautifully illustrates the original high purpose of the Act. Under it these plaintiffs are entitled definitely to a real investigation, and, I think, to a hearing on their charges, before these ferries are sunk without a trace.

Defective Notice

The statute (13a(1)), plainly never contemplated a valid notice of discontinuance of the entire New York Central Hudson River ferry service to consist of two words, "all ferries". The notice of discontinuance indicated is to cover specifically each train or ferry to be abandoned. The section speaks of "proposed discontinuance or change, in part or in whole, of the operation or service of any train or ferry operating from a point in one State to a point in another State." It then refers to "such train or ferry". As used, the word "train" has its normal meaning, one transportation unit. It is not to be twisted into denoting a line of railroad. Nor is "ferry" in the text to be converted from a single vessel to the New York Central fleet of ferries. It is one of the strange features of this dispute that the Interstate Commerce Commission's own interpretation of the kind of notice required by Section 13a(1) is steadfastly ignored. *Two days after the amendment was*

(Continued from preceding page)

The fact that 13a(1) was properly inserted into the Interstate Commerce Act immediately following its parent Section 13 increases the difficulty of ignoring the presence of the general pervading law. It is one more incident illuminating the relationship 13a(1) bears to 13(1) and (2).

approved, the Commission issued its rules and regulations under it and these provided that "A separate notice shall be given in respect of each train or ferry concerning which a discontinuance or change of operation is proposed." (Emphasis supplied.) This was the necessary interpretation called for by the statutory language. Nevertheless the Commission permitted the vitally defective notice to effect the destruction of the whole public passenger Hudson River ferry system of the defendant railroad, all, according to the Commission and the railroad, without recourse.

This lack of compliance with even the scant notice provisions of 13a(1) is sufficient to reveal the ruthlessness of the effort to forthwith abandon the ferry service and more than sufficient to justify the affirmative action of this court to prevent such action, at least until a decent respect for the rights of the plaintiffs has been observed.

Is Section 13a(1) Unconstitutional?

It would seem most doubtful that the problem of unconstitutionality will arise, but by reason of the dangerous endeavor to down grade this most serious question it should be briefly presented in its true light.

Because the defendant railroad was thwarted in its maneuver to close out its ferry operation under non existent jurisdiction of the Commission, Section 13a(1) came into being. Its avowed purpose was to cut off an important public transportation artery which the New York Central originally had voluntarily sought and obtained and of which it has had exclusive possession since 1883. Under it the carrier was to be able to discard this utility, because of the claim that it was no longer profitable or for no reason and without the semblance of a hearing to the states, their components and the citizens affected. On this theory,

New York, New Jersey, their counties, towns and people have no right to be heard in opposition. Substantially, it is considered perfectly proper for the railroad to have obtained these ferry franchises, operated under them in such fashion that, combined with other essential elements, i.e., changing transportation, etc., they are now alleged liabilities and thereupon, ex parte, eliminate the entire ferry system without one slight gesture of adequate substitution means of travel to the people who have become dependent on the service through the years. Currently changed conditions are the fact. Long overdue economic efficient methods, higher fares and the like have bettered the railroad's position. How much this amounts to is not to be guessed at but should not remain hidden Ferry riders have decreased but so has the service, both in quantity and quality. As an absolute minimum the status of public passenger water surface transportation between New York City and most of the United States cries for a fair hard look before this strange, dismaying law is allowed to write an end to that transportation in peace and in war.

The deliberate deprivation of hearing could not have been motivated by fear, for the railroad protests the rigidness of its attitude. It could not have been on account of some possible temporary delay arising from a hearing, for the operation is over half a century old and the Commission could pass upon the issue promptly. Apparently it was just that the railroad wanted it that way, and one thing is certain, namely, that the public was ignored in the formulation of the amendment 13a(1). I have therefore grave misgivings about the justice of the statute for the Fifth Amendment also protects states and their subdivisions and their citizens.

Appendix B

Remedy

Some mention should be made of remedy because of the various confusing suggestions at the hearing.

If the Commission has been wrong in law by construing 13a(1) as some sort of sui generis authority (instead of as an integral part of the Act, which it is, and as such governed by the general all inclusive provisions of 13(1) and (2)) the injunction should be made permanent and the case sent back to the Commission to dispose of properly under 13(1) and (2). Dismissal of the suit for lack of jurisdiction, coupled with the prior thought that the plaintiffs could seek a mandamus remedy in the District of Columbia, is not at all indicated. A simple mistake of law has been made and it is up to the Commission to rectify it. The same practice would apply to a decision based on defective notice. If the matter were to be so returned to the Commission, the latter would be directed to set aside the notice which latter action would automatically end the present proceeding.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 622

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, AND COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD AND THE TOWNSHIP OF TEANECK; AND CITIZENS UNITED TRANSIT COMMITTEE,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellees.

On Appeal From the United States District Court for the District Court of New Jersey

STATEMENT AS TO JURISDICTION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, AND COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD AND THE TOWNSHIP OF TEANECK; AND CITIZENS UNITED TRANSIT COMMITTEE, *Appellants,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellees.*

On Appeal From the United States District Court for the District Court of New Jersey

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STATEMENT AS TO JURISDICTION

Appellants,* plaintiff-intervenors below, appeal from the final order and decree of the specially con-

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* County of Bergen, State of New Jersey; County of Rockland, State of New York; the Boroughs of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood and the Township of Teaneck, municipal corporations of the State of New Jersey; and the Citizens United Transit Committee, an unincorporated association

stituted three-judge United States District Court for the District of New Jersey entered December 4, 1958, dismissing the complaint of appellants and dissolving the preliminary injunction theretofore granted and issued. Appellants submit this statement in compliance with Rules 13 and 15 of the Revised Rules of the Supreme Court of the United States to show the basis upon which the Supreme Court has jurisdiction on direct appeal to review the said judgment of the District Court and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the majority of the specially constituted District Court of three judges and the dissenting opinion of Circuit Judge McLaughlin are not yet reported. The majority opinion of the District Court and the dissenting opinion of Circuit Judge McLaughlin are annexed hereto as Appendix A. The "Notice" of the Commission dated August 26, 1958, Finance Docket No. 20291, and its "Order" therein dated September 2, 1958, also are not reported and are annexed hereto as Appendices B and C, respectively. The final order and decree of the majority of the District Court is annexed hereto as Appendix D.

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of users. The State of New Jersey and the Board of Public Utility Commissioners of the State of New Jersey, plaintiffs below, have filed their separate notice of appeal; they will be referred to throughout this Statement as to Jurisdiction as "State" and "Board" respectively. The New York Central Railroad Company hereinafter will be referred to as the "Railroad"; the United States of America as the "United States"; the Interstate Commerce Commission as the "Commission".

BASIS OF JURISDICTION

I.

This action was instituted in the District Court by the State and Board against the United States, the Commission and the Railroad for an order enjoining the discontinuance by the Railroad of its Weehawken Ferries operating between Weehawken, New Jersey and New York City, New York ostensibly pursuant to Section 13a(1) of the Interstate Commerce Act, 49 U. S. C., and for a further order enjoining, annulling and setting aside the order and determination of the Commission, wherein the Commission decided not to enter upon an investigation of or otherwise stay the proposed discontinuance and dismissing certain complaints and petitions filed thereon with the Commission. The suit commenced pursuant to 28 U. S. C. §§ 1336, 1398, 2282, 2284, 2321-2325, 1331 and 5 U. S. C. 1009.

Thereafter, appellants, having been parties to the action before the Commission by virtue of their complaint and petition for reconsideration there filed, were permitted to intervene as plaintiffs by the District Court and to file a complaint and to be heard on brief and argument.

II.

The final judgment of the United States District Court for the District of New Jersey (Circuit Judge McLaughlin dissenting) was entered on December 4, 1958. Notice of appeal was filed in the District Court by the State and Board on or about December 17, 1958. Thereafter, notice of appeal was filed by appellants on December 30, 1958.

III.

The jurisdiction of this Court to review on appeal the final order and decree of the District Court is conferred by 28 U. S. C. § 1253, 62 Stat. 926.

IV.

Section 13a(1) of the Interstate Commerce Act, 49 U. S. C., was very recently legislated by the Congress of the United States and signed by the President of the United States on August 12, 1958. No decisions of this Court relating to Section 13a(1) have been found and none is believed to exist. However, cases which sustain the jurisdiction of a specially constituted statutory United States District Court of three judges under similar circumstances are numerous. On sustaining the right to appeal directly to this Court pursuant to 28 U. S. C. § 1253, from a decision of a specially constituted United States District Court of three judges which upheld the constitutionality of an Act of Congress there under attack and dismissing a complaint seeking injunctive relief see *Berman* v. *Parker*, 348 U. S. 26 (1954); on sustaining the right of direct appeal from a decision of a three-judge United States District Court in a suit to enjoin an order of the Commission see *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U. S. 300 (1958).

V.

The provision of the Interstate Commerce Act, the validity of which is involved in this proceeding, is as follows:

Sec. 13a(1) [72 Stat. 571; 49 U. S. C. 13a(1)] (Appendix E, *infra*, p. 36a).

Other provisions of the Interstate Commerce Act applicable to the issues are principally Section 13(1) and (2) and Section 1(18) set forth in Appendix E hereto.

QUESTIONS PRESENTED

1. Whether the Notice and Statement filed by The New York Central Railroad Company with the Inter-State Commerce Commission on August 13, 1958 complied with the requirements of Section 13a(1) of the Interstate Commerce Act, Title 49, U. S. C.

2. Whether in issuing its Notice dated August 26, 1958 and its Order dated September 2, 1958, Finance Docket No. 20291, the Interstate Commerce Commission complied with the requirements of Section 13(1) and (2) of the Interstate Commerce Act, Title 49, U. S. C.

3. Whether the determination of the Interstate Commerce Commission, embodied in its Notice dated August 26, 1958 and its Order dated September 2, 1958, Finance Docket No. 20291, not to enter upon an investigation or otherwise to require continuation of service via the Weehawken Ferries constitutes an order of the Interstate Commerce Commission within the purview of Section 1336, Title 28, U. S. C.

4. Whether the determination of the Interstate Commerce Commission, embodied in its Notice dated August 26, 1958 and its Order dated September 2, 1958, Finance Docket No. 20291, ignoring or dismissing complaints and petitions for reconsideration filed therein, constitutes agency action subject to judicial review within the purview of Section 1009, Title 5, U. S. C.

5. Whether the majority of the District Court erred in refusing to consider that the Interstate Commerce Commission had failed to authorize increases in ferry fares at least to the extent conceded necessary in proceedings instituted by The New York Central Railroad Company in Docket No. 32359 (Fares and Charges via Weehawken Ferry).

6. Whether the majority of the District Court correctly construed Section 13a(1), Title 49, U. S. C., in holding that the passenger service of The New York Central Railroad Company via the Weehawken Ferries is free from public regulation at the sole discretion of the Interstate Commerce Commission.

7. Whether Section 13a(1), Title 49, U. S. C., as construed by the majority of the District Court is an unlawful delegation of legislative power in contravention to and derrogation of Article I of the Constitution of the United States in that no legislative standard is provided to guide the Interstate Commerce Commission in its determination not to hold an investigation or otherwise to require continuation of service via the Weehawken Ferries.

8. Whether Section 13a(1), Title 49, U. S. C., as construed by the majority of the District Court, is violative of the due process clause of the 5th Amendment of the Constitution of the United States in that it deprives appellants of an opportunity to be heard on issues raised before the Interstate Commerce Commission.

9. Whether the majority of the District Court erred in refusing to receive evidence offered by appellants of the major curtailments of service by trains and ferries permitted by the regulatory agencies of the

States of New York and New Jersey in recent periods subsequent to the closing of the record before the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act, Title 49, U. S. C., New York Central R. Co. Ferry Abandonment, 295 I. C. C. 385 and 519.

10. Whether the majority of the District Court erred in refusing to receive and consider evidence of the franchise, charter and contractual obligations of The New York Central Railroad Company to the States of New Jersey and New York, the political subdivisions thereof and to its passenger users while continuing operations as a common carrier.

STATEMENT OF THE CASE

The Railroad operates as part of its system a line of railroad along the west shore of the Hudson River in both interstate and intrastate commerce. For many years past this line operated in both freight and passenger service between Albany, New York and New York City, the last mile or so of the easternmost portion being performed by ferries, car floats, lighters and barges between Weehawken, New Jersey and New York City. Since 1954 the Railroad through numerous petitions to the regulatory agencies of the States of New Jersey and New York and the Interstate Commerce Commission has sought to discontinue its twenty-four hour daily passenger service along this line while retaining its lucrative freight service.

After detailed hearings the State regulatory agencies have issued orders permitting the Railroad to reduce sharply the number of passenger train schedules to a minimum operating only during the morning and evening rush hours with no service on weekends or holidays.

As recently as June, 1958 the Railroad was permitted a further reduction by the State agencies so as to provide passenger service west from New York City only to West Haverstraw, New York, 34 miles away.

Notwithstanding, however, the Commission, upon application of the Railroad pursuant to Section 1(18) of the Interstate Commerce Act, issued its certificate authorizing discontinuance of the ferry service between Weehawken, New Jersey and New York City, without which the railroad passengers would have no available transportation across the Hudson River to their places of employment in New York City and return. Accordingly, from this order and determination, Board, State and appellants herein sued for injunctive relief in statutory three-judge United States District Court, District of New Jersey, on the grounds that the Commission was without jurisdiction in the matter and, in the alternative, *inter alia,* that the determination of the Commission was without substantial evidence of record. Appellants were granted leave to intervene as plaintiffs in that suit and participated fully throughout.

That District Court, thereafter, found that since the Railroad proposed and the Commission authorized discontinuance of less than the whole service on a line of railroad or portion thereof (because the trans-Hudson freight service was to be continued via car floats, lighters and barges), the Commission was without jurisdiction in the matter. The preliminary injunction theretofore issued was made permanent on December 31, 1957. *Board of Public Utility Comm., et al.,* vs. *United States, et al.* (D. C. N. J. 1957) 158 F. Supp. 98. From that decision the Railroad noted a direct appeal to this Court which has noted probable jurisdiction.

The appeal is still pending, and the record is in the process of being printed. *The New York Central Railroad Company* vs. *Board of Public Utility Comm. et al.*, October Term, 1957, No. 838; October Term, 1958, No. 41. Appellants herein are also parties to that appeal.

In passing upon the questions presented in that action the District Court in its unanimous opinion, although disposing of the matter on jurisdictional grounds, made the following observation:

> "Regarding the second section of this suit, which attacks the Commission's determination of public convenience and necessity, we have seriors doubts of the adequacy of the findings of fact and of their support by substantial evidence, but because of the definitive conclusion of lack of jurisdiction we do not pass upon the point at this time." 158 F. Supp at pages 103, 104.

Thereafter, on January 16, 1958, the Railroad petitioned the Commission to institute an investigation and, following which, to grant substantial increases in rates, fares and charges of 351 per cent for transportation on the ferries. I. C. C. Docket No. 32359. Appellants were parties to this proceeding and offered evidence on the record upon the closing of which the hearing examiner issued his proposed report recommending increases up to 200 per cent. These increases, although somewhat excessive, to a very large extent met with the approval of appellants upon the representation of the Railroad that the ferries would continue for an indefinite period in the future. Nevertheless, the Railroad, not satisfied with the recommendation of the examiner, petitioned for reconsideration, and notwithstanding the many months which have

passed since then the Commission has failed to proceed further in the matter.

During the closing hours of the 85th Congress, Second Session, Section 13 of the Interstate Commerce Act was amended by adding thereto Section 13a(1) here under attack. The haste with which this amendment was enacted, ostensibly with the principal design of permitting the Railroad to discontinue its trans-Hudson ferry service and override the earlier decision of the District Court (See Appendix A, dissenting opinion, footnote 1), is reflected by the fact that one day after it was signed into law the Railroad served a single notice on the Commission, under color of Section 13a(1), of discontinuance of the ferry service. One day later the Commission issued its Rules and Regulations governing procedure under Section 13a(1), effective August 29, 1958.

The Commission assigned the case Finance Docket No. 20291. Board and State filed with the Commission a formal complaint pursuant to the general complaint procedure of Section 13 on August 25, 1958, and appellants filed a similar complaint on August 26, 1958, both within the statutory time limit for such complaints. On that latter day, however, and at least one hour prior to the timely filing of the complaint of appellants, the Commission issued its "Notice" (Appendix B) wherein it concluded not to enter upon an investigation or otherwise stay the discontinuance of the ferry service. Immediately appellants petitioned for reconsideration and again requested an opportunity to be heard. Thereafter, on September 2, 1958, the Commission issued its Order in the same proceeding wherein it said, *inter alia*:

> "*And it is further ordered*, that the said petitions for reconsideration are denied. . . ." Appendix C.

This summary disposition of the matter was permitted notwithstanding the fact as found by the several state regulatory agencies as well as the Commission itself, that some eight or twelve thousand rush hour commuters would be left stranded with no public transportation between Weehawken, New Jersey and New York City. Accordingly, this action was commenced.

It should be added that although the District Court found for defendants in the case below and, accordingly, dissolved its preliminary injunction theretofore issued, nevertheless, it has granted a stay (Smith, D. J., dissenting) of its judgment, order and decree pending the final determination by this Court of this appeal. A subsequent motion of the Railroad to modify the terms of this stay was denied.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Section 13a(1) was signed into law on August 12, 1958, and, as stated, two days thereafter the Commission promulgated rules and regulations effective August 29, 1958 governing notices and petitions filed by common carriers by railroad pursuant to the said Section. This suit was commenced in the District Court by State and Board on September 4, 1958, two days following the Order of the Commission denying consideration of the complaints and petitions filed therein. During the intervening period no more than three similar applications were made to the Commission. Not until the determination of the action by the court below did the deluge fall in the form of approximately thirty notice-applica-

tions to discontinue passenger train service in every part of the nation. Indeed, so ambitious have become the railroads that one, the Lehigh Valley, seeks to discontinue all of its mainline passenger operations. Commission Finance Docket No. 20443. And while it is encouraging to note that the Commission, at least on that application, has suspended the effective date of proposed discontinuance for the statutory period of four months to afford investigation, nevertheless, the enormous volume of train miles and thousands of passengers involved in all areas of the land bespeak with clarity the national scope and enormity of the legislative and administrative action here under attack.

The questions presented by this appeal are divisible, roughly, into two general categories: (A) those inquiring into the validity of the actions by the Railroad and the Commission and the protection afforded the public therein, and (B) those inquiring into the validity of Section 13a(1) as construed by the majority of the District Court.

A. THE ISSUES ON THE VALIDITY OF THE ACTIONS OF THE RAILROAD AND COMMISSION AND PROTECTION AFFORDED THE PUBLIC.

1. Invalidity of the Notice Filed by the Railroad

In ostensible compliance with Section 13a(1), one day after it became law the Railroad filed a one-sheet, two-sentence, mimeographed Notice with the Commission together with a nine page argumentative statement of its counsel, upon the basis of which the Railroad sought to discontinue a vital instrument of public transportation which serves daily an excess of eight thousand passengers for whom there exists no alternate means of public transportation. Whether the

Railroad, or any railroad, may discontinue all or a substantial portion of its passenger service by such summary action does not find support in the statute, the clear language of which requires, among other things, that a separate notice be given for each train and ferry.

The language of the statute is explicit and the Commission's own interpretation of that language contained in its Rules and Regulations promulgated on August 14, 1958, two days after passage of Section 13a(1), support the conclusion of the dissenting judge of the District Court. It was not the intention of Congress, while leaving in force Section 1(18) of the Interstate Commerce Act relating to complete discontinuance of service over a line of railroad or any portion thereof with its provisions for the ascertainment of public convenience and necessity, that Section 13a(1) should be used as a statutory subterfuge to perfect complete discontinuance upon the filing of a mere two sentence notice by the carrier, followed by inaction of the Commission without investigation.

Admitting, *arguendo*, that it may have been the intention of Congress to vest in the Commission uncontrolled discretion to permit discontinuance of the service of a single ferry and that there exists no constitutional bar to the granting of such unbridled discretion, it is submitted, nevertheless, that the intention of Congress to promote safe, adequate, economical, and efficient railroad service, decreed by Congress as the National Transportation Policy, 49 U.S.C. preceding § 1, will be frustrated and destroyed if this Railroad or any other is permitted to destroy its passenger service in such summary fashion. The purpose of the Notice

to be filed by the Railroad with the Commission is not only to advise the Commission and the traveling public of the proposal of the Railroad, but, in addition, a statutorily correct and adequate notice must be filed because the statute requires it.

Determination of this single issue in the direction to be advocated by appellants will be sufficient to remand the proceeding to the District Court and thence to the Commission for appropriate action.

2. Section 13(1) and (2) Proceedings are Applicable to Section 13a(1)

An important question on this appeal is whether Section 13a(1) should be so construed as to require the Commission to follow the general complaint and investigation provisions of Section 13(1) and (2) and, if so, did the action of the Commission in issuing its Notice dated August 26, 1958 and its Order dated September 2, 1958, comply with such provisions.

Section 13a(1) was made an integral part of Section 13 of the Interstate Commerce Act, wherein is imposed a general hearing requirement on the Commission in complaint proceedings by virtue of Section 13(1) and (2) which remain in full force and effect. Section 13(1) provides that when any person files a petition with the Interstate Commerce Commission "complaining of anything done or omitted to be done by any common carrier", the Commission shall forward the complaint to the carrier who shall either satisfy the complaint or answer it in writing within a reasonable time. If the complaint is not satisfied, or if there shall appear to be any reasonable ground for investigating the complaint, the Commission is under a duty to investigate it. This Court has held that the Commission

has no alternative but to investigate. *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 39 (1904). Under Section 13(2) the Commission is not required to give the carrier the opportunity of satisfying the complaint, but is required to investigate every complaint forwarded to it by a State railroad commissioner or commission.

Immediately after the Railroad, purporting to act under Section 13a(1), filed with the Commission its notice of proposed discontinuance, appellants, on August 14, 1958, informed the Commission of their protest to the proposed discontinuance and requested the Commission to hold an investigation. On August 26, 1958 the said appellants filed their formal complaint. The appellants State and Board similarly filed their complaint with the Commission on August 25, 1958 requesting a public hearing and investigation to determine present and future public convenience and necessity as required by Section 13a(1). The Commission not only did not investigate or grant a hearing, but "concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued", and on August 26, 1958 and September 2, 1958 issued its Notice and Order respectively to that effect.

If the procedural provisions of Section 13(1) and (2) are to be read in conjunction with Section 13a(1), it is clear that the agency actions taken on August 26 and September 2, 1958 did not comply with existing and well-established statutory complaint and investigation provisions. It is submitted that Congress selected existing Section 13 to which to add the provisions found in Section 13a(1) for the very reason of the already existing and judicially well defined complaint.

procedure there embodied. The action of the District Court would have this obvious conclusion denied and require appellants and others to depart without opportunity to be heard notwithstanding the filing of complaints and petitions which on their face bespeak prima facie of their sufficiency.

3. and 4. Availability of Judicial Review of the Commission's Notice and Order

A substantial question in this appeal is whether the determination of the Commission, embodied in its Notice dated August 26, 1958 and its Order of September 2, 1958, Finance Docket No. 20291, not to enter upon an investigation or otherwise require continuation of service via the Weehawken ferries constitute *orders* of the Commission within the purview of Section 1336, Title 28, U.S.C. and *agency action* subject to judicial review within the purview of Section 1009, Title 5 U.S.C.

The District Court, in its majority opinion, held that it had no jurisdiction under Section 1336, because the "Notice" of August 26, 1958 was not an "Order" covered by Section 1336. The majority of the District Court also held that the said agency actions were not reviewable under Section 1009, Title 5, U.S.C. of the Administrative Procedure Act, because in Section 13a(1) Congress committed to the Commission discretion to determine whether or not to institute an investigation of a proposed discontinuance. It is submitted that the District Court erred in so holding.

The Administrative Procedure Act, 5 U.S.C. 1009(c) makes final "agency action" reviewable, and "agency action" is defined in 5 U.S.C. 1001(g) to include "* * * the whole or part of every agency rule, order,

license, sanction, relief, or the equivalent or denial thereof, or failure to act." As defined in Section 1001(d), Title 5 U.S.C. "Order" means "the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) of any agency in any matter other than rule making but including licensing." Irrespective of the term "Notice" used by the Commission, the action of the Commission in concluding not to enter upon an investigation or otherwise require the continuance of the ferry service was a juristic act by which the Commission purported to dispose finally of the issues, and was an "Order" subject to review under Section 1336, Title 28, U.S.C. The "Order" of the Commission dated September 2, 1958 denied all petitions for reconsideration except that of the Railway Labor Executives' Association which requested the imposition of certain conditions for the protection of employees adversely affected by the proposed discontinuance.

There is actually no pertinent distinction between the "Notice" of August 26th and the "Order" of September 2nd. The effect of the Notice of August 26th was to dispose finally of a matter which Section 13a(1) purported to vest in the Commission. The Order of September 2nd was a final order upon reconsideration of the Commission's decision announced in the Notice. This Court, in *Frozen Food Express* v. *United States*, 351 U.S. 40, 44 (1956), laid down the test for reviewability of orders of the Interstate Commerce Commission wherin it held that an order which has "an immediate and practical impact" and is not "abstract, theoretical, or academic" is reviewable.

Contrary to the conclusion of the majority of the District Court that Section 13a(1) gives exclusive and

unfettered discretion to the Commission in determining whether or not it will enter upon an investigation, and, accordingly, that its decision to act or refrain from action is not reviewable under Section 1009, Title 5 U.S.C. it is submitted that Section 1009, which excepts from review agency action which is by law committed to agency discretion, does not mean that there can be no review merely because agency action involves an element of discretion or judgment. Whether the court would set aside an agency action founded upon the exercise of discretion and judgment is a totally different question from whether the court may review the action for purposes of determining its validity. *Homovich* v. *Chapman*, 191 F. 2d 761, 79 U.S. App. D.C. 150 (1951). No matter on what ground an attack is based, the general question as to whether certain administrative action is valid is a judicial question. *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U.S. 541 (1912). All questions as to the validity of administrative procedure are judicial questions for the courts. *Morgan* v. *United States*, 298 U.S. 468 (1936). Whether a finding is supported by substantial evidence is a judicial question. *United States* v. *Louisville & N. R. Co.*, 235 U.S. 314 (1914). Whether Congress authorized the administrative method of proof and of adjudication pursued by the agency is a judicial question. *The New England Divisions Case*, 261 U.S. 184 (1923). Questions of law affecting private rights involved in an administrative determination are judicial questions. Judicial questions are always open for the independent decision of an appropriate court of law. Vom Bauer, *Federal Adminsitrative Law*, ed. 1942, Vol. 1, Section 424 et seq.

Since the questions raised in the District Court with respect to the Commission's decisions on August 26

and September 2, 1958, were judicial questions, the court erred in holding that it had no jurisdiction to review such decisions under Section 1009 of the Administrative Procedure Act.

Furthermore, even though courts may have no jurisdiction to review administrative discretion when it is reasonably exercised, in appropriate circumstances they can compel correction of an abuse of discretion. *Mastrapasqua* v. *Shaughnessy* (CA NY 1950), 180 F. 2d 999.

Here the refusal of the Commission to investigate upon the complaints and protests of appellants and others or to test their sufficiency was not a ministerial determination, was not made in good faith, was not made in the public interest, was not supported by the evidence in the record before it at the time it rendered its decision, and was not supported by the necessary basic findings of fact. This was arbitrary action on the part of the Commission. Where discretion is conferred upon an administrative officer or agency to render a decision, its decision must be honestly rendered, and if it is arbitrary or capricious, or rendered in bad faith, then the courts have the power to review the decision and set it aside. *Crocker* v. *United States*, 127 F. Supp. 568, 130 Ct. Cl. 567 (1955). An administrative determination must not be arbitrary. *Myles Salt Co.* v. *Board of Com'rs. of Iberia & St. Mary's Drainage Dist.*, 239 U.S. 478 (1916).

Even in cases where judicial review is expressly precluded by statute or agency action is expressly committed by statute to agency discretion, where questions are raised on the interpretation and con-

stitutionality of the statute under which the discretion is given, as was done in the District Court proceeding, those questions may be tested and reviewed by the courts. See *Ludecke* v. *Watkins*, 335 U.S. 160 (1947).

The determinations of the Commission embodied in its notice of August 26, 1958 and its Order of September 2, 1958 are reviewable, and the majority of the District Court erred in holding to the contrary.

5. Failure to Consider Recommended Fare Increases as Relieving Financial Burden

The basis of the Commission's orders allegedly was the record made before it by the Railroad in its abandonment of service action brought pursuant to Section 1(18) of the Interstate Commerce Act four years ago and the record made before it upon an application of the Railroad during the Spring of 1958 for an increase in fares for transportation via the ferries. Of course, the Railroad seeks to discontinue the service solely because of its economically deficient character. Therefore, when the Commission's hearing examiner recommended fare increases up to 200 per cent which, when coupled with almost contemporaneous reductions in operating costs, would reduce substantially and probably eliminate all deficits, appellants considered this a factor which must weigh heavily upon the Commission in making its determination.

However, the Commission failed or refused to alter its adamant stand notwithstanding that appellants, the users of the ferries, were fully prepared to pay more for their transportation so long as the service continued. Obviously, appellants had little choice in

the matter, inasmuch as the ferries offered the only means of public transportation between the rail terminal at Weehawken, New Jersey and New York City. But upon a survey of the more than five thousand members of appellant, the Citizens United Transit Committee, it was revealed that they were motivated to a larger degree by a belief that the Railroad actually deserved financial improvement; said appellants represented to the Commission during the course of that proceeding that substantial fare increases would not meet with their resistance and the hearing examiner arrived at this recommendation accordingly.

Rather than act upon the recommendations of its own examiner, the Commission chose instead a course of inaction. It is submitted that the District Court should have considered this failure or refusal of the Commission to act. Certainly removal of the economic deficit allegedly produced by the ferry operation would remove the sole lawful basis for the application of the Railroad, particularly in light of the large number of ferry users and the absence of any alternative means of public transportation.

6. Whether to Regulate or Not Does Not Rest Upon the Sole Discretion of the Commission

This Court has long recognized the divisibility of commerce between the states into three categories. *Covington & C. Bridge Co.* v. *Kentucky*, 154 U.S. 204, 209 (1894), held:

> "The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the states is

exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all."

It is to this second class of cases—those sometimes termed concurrent jurisdiction—to which belong the Railroad's Trans-Hudson ferries. *Braniff Airways* v. *Nebraska State Board,* 347 U.S. 590 (1954); *California* v. *Thompson,* 313 U.S. 109 (1941); *Southern Pacific R. Co.* v. *Arizona,* 325 U.S. 761 (1945); *Wilmington Transp. Co.* v. *Railroad Com.,* 236 U.S. 151 (1915); *Port Richmond & B. P. F. Co.* v. *Hudson County,* 234 U.S. 317 (1914); *Atlantic C. L. R. Co.* v. *Georgia,* 234 U.S. 280 (1914); *New York C. & H. R. R. Co.* v. *Hudson County,* 227 U.S. 248 (1913); *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U.S. 196 (1885); *Cardwell* v. *American River Bridge Co.,* 113 U.S. 205 (1885); *Wiggins Ferry Co.* v. *East St. Louis,* 107 U.S. 365 (1883); *Pound* v. *Turck,* 95 U.S. 459 (1878); *Gillman* v. *Philadelphia,* 70 U.S., 3 Wall. 713 (1866); *Conway* v. *Taylor,* 66 U.S., 1 Black 603 (1862); *Fanning* v. *Gregoire,* 57 U.S., 15 How. 524 (1853); *Wilson* v. *Blackbird Creek March Co.,* 27 U.S., 2 Pet. 245 (1829).

Prior to the enactment of Section 13a(1), regulation of the quantum of service offered by the Railroad reposed in the States of New York and New Jersey. There seems to exist little doubt but that with Section 13a(1) Congress did indeed intend to preempt the field, thereby ousting state jurisdiction. However, it is submitted that in such a situation the action of Congress must be carefully scrutinized. The argument of the Railroad, adopted by the District Court, was to the effect that Congress, by its action, did not

repose regulatory jurisdiction in the Commission, but, on the contrary, left to the Railroad, a public utility, unhampered power to regulate itself. The conclusion of the majority of the District Court is to the effect that it is the Commission which decides whether or not the Railroad service will be regulated and that in this determination the public may not be heard to speak. Furthermore, the determination of the Commission was held not to be judicially reviewable.

It is submitted that the Congress did not—indeed, it could not—delegate to the Commission such a power in the absence of adequate legislative standard designed to foreclose abuse of Commission discretion. Whether or not passenger train service is to be free from regulation is for the determination of the Congress and not of the Commission.

B. THE CONSTITUTIONAL ISSUES.

7. Absence of Legislative Standards

A substantial question in this case is whether Section 13a(1), Title 49, U.S.C. as construed by the majority of the District Court is an unlawful delegation of legislative power in contravention to and derogation of Article I of the Constitution of the United States in that no legislative standard is provided to guide the Interstate Commerce Commission in its determination not to hold an investigation or otherwise to require continuation of service via the Weehawken ferries.

Section 13a(1) is the equivalent of a provision giving the Commission authority to permit the discontinuance of operation upon the application of the carrier without legislative guidance to be followed by the Commission in the exercise of this authority. No criteria

or standards whatever are prescribed in the statute for the guidance of the Commission in the exercise of the power granted to it. By simple failure to act the Commission is empowered to make a permanent alteration in the legal relationship previously existing between a common carrier and the governments and people of the States served by it. The statute does not require the Commission in deciding not to institute an investigation to base its decision upon substantial evidence in the record before it, nor does it require the Commission to make any basic findings of fact to support its decision. The authority to act or to refrain from acting is given the Commission without even the vestige of legislative standards or other legal principles to control the Commission. Instead, permissive power of regulation is left to the whim of the Commission without any restraint whatsoever to avoid arbitrary action and abuse of discretion in contravention of constitutional safeguards setting limitations to arbitrary action.

The Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article I, Section 1. The power to regulate interstate commerce is given to Congress. Article I, Section 8, paragraph 3. That Congress cannot delegate its essential legislative power nor may it be usurped by administrative agency action is a basic principle of constitutional law not open to dispute. Where Congress entrusts administrative agencies with broad control over activities with which it does not choose to deal directly, Congress must establish appropriate standards to guide administrative action. In every case in which the

question of delegation of legislative power by an act of Congress has been raised, this Court has recognized this constitutionally non-delegatory aspect of Congressional power and, accordingly, has held statutes invalid in the absence of Congressionally prescribed standards of conduct. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

If Congress is to take away from the States the right to regulate the amount or kind of serice to be furnished by a public carrier and delegate that authority to the Commission or even to the Railroad, it is submitted that the statute should be carefully scrutinized.

In the event the Commission does elect to investigate, then the Congressional standards are found in abundance in Section 13a(1). These express legislative standards are "public convenience and necessity" and "undue burden on interstate commerce", both well understood through judicial interpretation and administrative application. It is submitted that the intent of Congress was to impose these same standards upon the Commission when it exercised its determination in the instant case. The contrary construction placed upon Section 13a(1) by the majority of the District Court rendered the statute unconstitutional.

8. Section 13a(1), as Construed, Is Violative of the 5th Amendment

The power of Congress to regulate commerce is not absolute, and the exercise of that power is subject to the requirements of the Fifth Amendment. *United States* v. *Chicago, M. St. P. & R. R. Co.*, 282 U.S. 311

(1931), affirming *Chicago, M. St. P. & R. R. Co.* v. *United States,* 33 F. 2d 582 (Ill. N.D. 1929); *Currin* v. *Wallace,* 306 U.S. 1, 14 (1939). Congress cannot constitutionally authorize the Commission to permit a railroad to discontinue the operation of any train or ferry without the exercise of regulatory power in accordance with applicable principles developed by the courts in the light of the Constitution.

The first of those principles is that regulatory power delegated by Congress must be exercised in conformity with adequate standards prescribed by Congress. The second is that such regulatory power, when it affects the interests of the public, can be exercised only in conformity with the requirements of due process, including an opportunity for a hearing and the presentation of evidence pertinent to the prescribed standards.

The basis deficiencies of due process in Section 13a(1) standout clearly when that section is compared with Section 13a(2). Both Sections recognize the existence of State regulatory laws, regulations and orders controlling the operation of trains and ferries. The provisions of Section 13(a)(1) are in sharp contrast with those of Section 13a(2) which gives the Commission jurisdiction to take action only after full hearing and upon finding of specific facts with prescribed criteria as a prerequisite of action. In the well known case of *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U.S. 88 (1913), this Court rejected the government's contention that an order based on the opinion of the Commission that certain charges were unreasonable could not be set aside even if the said opinion was without substantial evidence to support it. The Court said:

> "* * * if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." 227 U.S. at page 90.

This statement of the Court, though involving rates and charges under a law which specifically gave a right to a hearing, is applicable in principle to the present case. As construed by the majority of the District Court, the authority which Section 13a(1) purports to vest in the Commission may be exercised without any hearing whatever. The repugnance of such procedures, based upon no standards or criteria, to the 5th Amendment to the Constitution, is axiomatic.

Section 13a(2) appears to satisfy the requirement of procedural due process. Section 13a(1) clearly does not. The separate application of the two sections would, moreover, result in unreasonable discrimination between two large groups of persons—those who are obliged to cross State lines and those who are not obliged to cross State lines in traveling to and from their places of business. The members of the first group could, under Section 13a(1) be deprived of all necessary and convenient means of railroad transportation

on 30 days' notice without hearing. The denial of due process through inadequacy of established administrative criteria and controls, absence of the right of hearing and of adequate notice in Section 13a(1), as compared with the wholly unwarranted classification of carriers in Section 13a(2) is a denial of equal protection of the laws and is prejudicial and discriminatory in the application of Congressional power under the Constitution as between the several States and their citizens.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The right to a full hearing in a quasi-judicial proceeding conducted by an administrative agency embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. *Morgan* v. *United States*, 304 U.S. 1, 18, 19 (1938). The basic elements of a full and fair hearing include the right to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut such evidence. *United States* v. *Dillman*, (C.A. 5, 1944) 146 F. 2d 572, 574, certiorari denied, 325 U.S. 870.

Tested by the aforementioned essentials of due process, there being no requirement in Section 13a(1) of notice or hearing as prerequisite to the Commission's approval of a proposed discontinuance of a train or ferry operating in interstate commerce, it is sub-

mitted that the statute is unconstitutional in that it denies interested and affected parties due process of law in contravention of the 5th Amendment. Accordingly, the statute and resulting action of the Commission cannot be upheld.

9. and 10. Right to Trial De Novo on Constitutional Issues

Questions of constitutional right and power raised by administrative action are appropriate for the exercise of judicial power and must be tried *de novo*. Trial *de novo* has two outstanding characteristics, (1) the reviewing court must reach its own independent judgment on the facts and the law without being bound by the rule of administrative finality on the facts, and (2) additional evidence may be introduced, so that the case need not be decided on the administrative record alone. Mr. Chief Justice Hughes, in *Crowell* v. *Benson*, 285 U.S. 22, 60, 64 (1932), said:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that function. [285 U.S. at p. 60] * * * We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own records and the facts elicited before it." (285 U.S. at p. 64).

Courts must decide *de novo* whether the action of an administrative agency is repugnant to the Constitution (*United States* v. *Louisville & N. R. Co.*, 235 U.S. 314 (1914)); whether an order deprives a party of his property without due process of law (*Missouri*,

K. & T. R. Co. v. *Oklahoma*, 271 U.S. 303 (1926)); or denies him a hearing and thus denies due process of law (*United States* v. *Louisville & N. R. Co., supra*; whether the constitutional power of Congress has been exceeded, whether a party has been deprived of equal protection of the laws as by administrative discrimination, and any other question of constitutional right or power, regardless of how the question arises. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936). The Court may, in proceedings to set aside an order as not in accordance with law, make its own examination and determination of facts wherever that is deemed necessary to enforce a constitutional right properly asserted. *Crowell* v. *Benson, supra.*

Whenever a party asserts that an administrative determination, if made effective, will deprive him of a constitutional right, he is entitled to have the constitutional question—but that question only—tried *de novo* in the reviewing court, so that an independent judicial determination of the constitutional question may be had. Vom Bauer, *Federal Administrative Law*, (*op. cit.*) Sections 262-264.

Upon trial *de novo* of a constitutional question the reviewing court must hear and weigh all competent evidence, receiving, if necessary, relevant evidence outside the administrative record bearing on the constitutional question (*St. Joseph Stock Yards Co.* v. *U. S., supra; Chicago, B-R. Co.* v. *Osborne*, 265 U.S. 14 (1924)); and reach its independent judgment on the facts and the law (*St. Joseph Stock Yards Co.* v. *U. S., supra;* See *Spano* v. *Western Fruit Growers* (C.A. 10 1936) 85 F. (2d) 150).

Trial *de novo* should be had with a view to setting forth the facts as they exist at the time of trial in the District Court, or as nearly as they may be ascertained as of that time. *Baltimore & O. R. Co.* v. *U. S.*, 298 U.S. 349 (1936). A party's right on trial *de novo* to challenge administrative findings is not conditional upon the production of the evidence taken in the administrative proceedings. *Spano* v. *Western Fruit Growers, supra;* Vom Bauer *Federal Administrative Law*, (*op. cit.*) Section 745-747.

Appellants were deprived of their right to trial *de novo* by the action of the majority of the District Court in denying their request to present evidence relative to the constitutional issues there raised.

CONCLUSION

Following the entry of its final order and decree, the District Court directed that the effective date of its final order be stayed and that the preliminary injunction theretofore issued be continued pending final determination by this Court of the issues. In so doing, however, the District Court conditioned its stay upon the filing by appellants State and Board and by appellants County of Bergen, *et al*, of their notices of appeal, the record and the jurisdictional statements all by January 2, 1958. Thus deprived of the usual ninety days within which to docket their appeal, appellants nevertheless have sought herein to impress upon this Court the seriousness of the issues here raised, and as clearly recognized by the District Court, the importance of their final determination by this Court.

The issues raised are substantial and their final resolution by this Court is essential, not only to appellants

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action, No. 1002-58

STATE OF NEW JERSEY and BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, *Plaintiffs*,

and

COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; the BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD and the TOWNSHIP OF TEANECK; and the CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, *Intervenors*,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY, *Defendants*.

Opinion

Before: HON. GERALD MCLAUGHLIN, C.C.J., HON. WILLIAM F. SMITH, D.J. and HON. REYNIER J. WORTENDYKE, JR., D.J.

By WORTENDYKE, D. J.

A branch line, commonly known as the West Shore Line, of the New York Central Railroad Company (Central) transports commuting passengers by rail and ferry between their homes in Rockland County, New York and Bergen County, New Jersey, and their places of employment in Greater New York City. The rail line of this branch terminates at Weehawken, New Jersey, which is located on the west side of the Hudson River, but the line is continued across the Hudson River to the City of New York by means of ferry boats. Central's passengers cross the

river in each direction, daily, by means of the ferries. For a period of years Central has been operating these ferries, as far as the transportation of passengers is concerned, at a substantial financial loss.

In December 1954, Central made application to the Interstate Commerce Commission, pursuant to section 1(18) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, 41 Stat. 477, 49 U.S.C. 1(18), (1952), for a certificate that public convenience and necessity permitted the abandonment of its Hudson River ferries. After extended hearings, the Commission's Division 4 reported that Central was entitled to such a certificate, *295 I.C.C. 385*, and this was affirmed by order of the full Commission on May 15, 1957. *295 I.C.C. 519*. Before the effective date of the ferry abandonment authorized by that order the present plaintiffs, Board of Public Utility Commissioners of the State of New Jersey (Board) and the State of New Jersey (State), brought an action in this Court to review the Commission's order. *Board of Public Utility Commissioners* v. *United States*, 1957, 158 F. Supp. 98. We decided in that case that the Commission was without jurisdiction to authorize Central to discontinue its passenger ferry service from Weehawken to New York City, while continuing to operate its waterborne freight transportation service by ferriage between the same cities. In reaching that conclusion we held that the discontinuance of passenger ferry service was not an abandonment of a portion of a line of railroad within the meaning of Section 1(18) *supra*, and therefore was beyond the power of the Commission to authorize. Cf. *Gulf M. & O. R. Co.* v. *Louisiana Public Service Commission*, D. C. La. 1954, 120 F. Supp. 250. We are told that an appeal from our decision was taken to and is still pending before the Supreme Court of the United States.

Pending that appeal the Congress enacted the Transportation Act of 1958, Pub. L. 85-625; 85th Cong., 2d Sess., 72 Stat. 568 (August 12, 1958). It is entitled "An Act

to amend the Interstate Commerce Act, as amended, so as to strengthen and improve the national transportation system and for other purposes." By this new legislation there was added to the Interstate Commerce Act, inter alia, a new section designated as Section 13a.

On August 13, 1958, Central, purporting to act pursuant to paragraph (1) of the new Section 13a, filed with the Commission, mailed to the respective Governors of New York and New Jersey and posted in its depots served by the ferries a notice that the operation of these ferries for the transportation of passengers would be discontinued at 12:01 a.m. on September 13, 1958.

On August 25, 1958, Board and State filed with the Commission a formal complaint requesting that the Commission enter upon an investigation of the proposed ferry discontinuance and set the matter down for hearing. In response to this complaint the Commission gave written notice, dated August 26, 1958, that "Upon consideration of the matters involved, including consideration of the records in Finance Docket No. 18781 (N. Y. Central R. Co. Ferry Abandonment, 295 I. C. C. 385 and 519) and Docket No. 32359 (Fares and changes via Weehawken Ferry) [it] has concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued, in whole or in part."

On September 4, 1958 the present action was instituted, invoking the same jurisdiction as that relied upon in the action to review the Commission's order of May 15, 1957, and additionally that claimed to be conferred by Title 28, U.S.C. §§ 1331 and 2282. Plaintiffs now seek a declaration that this new Section 13a(1) of the Interstate Commerce Act is unconstitutional, that its operation be enjoined, that Central be enjoined from discontinuing its Weehawken-New York ferry service and that the Commission's notice of August 26, 1958 and its order of September

2, 1958, be set aside.[1] Plaintiffs further pray that, if Section 13a(1) be declared constitutional, the Commission be directed to enter upon an investigation of the complaint filed by State and Board respecting the ferry discontinuance, and that Central be ordered to continue the operation of the ferry service pending hearing and decision by the Commission.

Upon due application we granted to the plaintiffs a preliminary injunction on September 12, 1958, having previously allowed the intervention, as plaintiffs, of County of Bergen, State of New Jersey; County of Rockland, State of New York; the Boroughs of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood, and the Township of Teaneck; and the Citizens United Transit Committee, an unincorporated association of New Jersey resident commuters. At the same time, the Public Service Commission of the State of New York was permitted to appear as amicus curiae. The operation of the ferries, therefore, continues. We are told that on September 29, 1958 Central applied to the Supreme Court of the United States for a stay of the Court's injunctive order of September 12, 1958 pending the final determination by the Supreme Court of an appeal therefrom, and that the application was denied by Mr. Justice Brennan on October 6, 1958.

Having duly come to issue, final hearing in the present action was held on November 3, 1958.

We recognize jurisdiction here under 28 U.S.C. § 2282 (1952), in conjunction with 28 U.S.C. § 1331 (1952).

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[1] The Commission order of September 2 provided that an investigation of the proposed discontinuance of ferry operations be instituted under the provisions of § 13a(1) of the Interstate Commerce Act "solely to determine the conditions, if any, which should be imposed for the protection of employees affected thereby;" but that petitions for reconsideration of the Commission's decision not to investigate the proposed discontinuance be, in all other respects, denied.

We find no jurisdiction under 28 U.S.C. § 1336 (1952), because the action is not one to "enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." On the contrary, the plaintiffs complain of the refusal of the Commission to act, i.e., "to enter upon an investigation of the complaint" of the plaintiffs. No "order" of the Commission is here complained of. Its written notice that it would not investigate the complaint does not constitute such action as is reviewable under § 1336 *supra*. Cf. *Rochester Telephone Corp.* v. *United States*, 1939, 307 U. S. 125. As was the case in *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 1927, 273 U. S. 299, 310:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything, which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation * * *."

The notice given by the Commission in the present case by way of response to the plaintiffs' complaint was nothing other than an announcement that the Commission intended to take no action with respect to the railroad's notice of intention to discontinue the ferries. Section 13a(1) clearly leaves to the absolute discretion of the Commission the determination of whether or not it, upon receipt of a complaint directed against a railroad's notice of intention to discontinue service, shall make any investigation of the matter or avail itself of its temporary veto power by way of suspension within the limitations of the Act. The Act is self-implementing insofar as it affords authorization to a

carrier to discontinue service. No provision is made for any action of the Commission to render such authorization effective. The efficacy of the congressional authorization is in no respect dependent upon any action on the part of the Commission. Obviously, therefore, the provisions of 28 U.S.C. § 1336 do not clothe us with jurisdiction here.

No greater jurisdictional assistance is afforded to the plaintiffs by the provisions of 5 U.S.C. § 1009 (1952), as will appear from the following critical language thereof:

> "Except so far as * * * agency action is by law committed to agency discretion. (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

In the case before us the statute under review expressly commits to the discretion of the Commission the determination of whether or not it will investigate any complaint which is evoked by a carrier's notice of intention to discontinue. Plaintiffs concede that the statutory language is permissive. Therefore, since the Commission's decision to act or refrain from action was committeed to its exclusive discretion, the right of review provided by Section 1009, *supra*, is, by the terms thereof, unavailable to these plaintiffs. *Panama Canal Company* v. *Grace Line, Inc.*, 1958, 356 U. S. 309. In that case the initiation of a proceeding for readjustment of Panama Canal tolls was committed, by congressional enactment, to the exclusive discretion of Panama Canal Company, an agency of and wholly owned by the United States and created by Congress for the purpose of operating and maintaining the Canal. Justice Douglas pointed out that Section 1009 excluded from judicial review thereunder agency action which had been committeed by law to agency discretion and that the initiation of a proceeding for the readjustment of canal tolls was a matter which Congress had left to the discre-

tion of the Panama Canal Company as an agent or spokesman of the President. Id. at 317. He continued:

> "The case is, therefore, quite unlike the situation where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action * * *. We put the matter that way since the relief sought in this action is to compel petitioner to fix new tolls. The principle at stake is no different than if mandamus were sought—a remedy long restricted, *Marbury* v. *Madison*, 1 Cranch. 137, 166; *Decatur* v. *Paulding*, 14 Pet. 497, 514-517, in the main, to situations where ministerial duties of a nondiscretionary character are involved. Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law, then judicial relief is often available * * *. But where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. (Citing inter alia *United States, ex rel Chicago G. W. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 62-63.) We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision." 356 U. S. at p. 318, *supra*.

The forthcoming language seems completely apposite to the factual situation with which we are here confronted. Section 13a(1) in pertinent part provides that "[u]pon the filing of such notice [of the carrier of its intention to discontinue service] the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change." The unqualified character of the discretion reposed to determine whether or not to investigate is at least as obvious in the foregoing language as in that of the Canal Zone Code authorizing the Canal Company to pre-

scribe and to change the canal tolls. It was in fact so construed on the Senate floor during the debate upon the Act.[2]

We are, therefore, relegated to the exercise of jurisdiction conferred upon this Court by 28 U.S.C. § 2282. In this position we are asked to restrain the operation of Section 13a(1) for repugnance to the Fifth Amendment to the Federal Constitution because, if interpreted as contended for by the defendants, it would deprive the users of the ferries of property without due process of law. Assuming for the purposes of argument that the users of these ferries have a standing to complain of their discontinuance, either directly or through the plaintiffs as their spokesmen, we immediately face the constitutional question.

It is conceded that the operation of these ferries is a facility of interstate commerce, and that "Congress could oust the States of all power to regulate interstate transportation." Federal power over such commerce is derived directly from Article 1, Section 8, cl. 3 of the United States Constitution. This constitutionally bestowed power was characterized by Chief Justice Marshall in *Gibbons* v. *Ogden*, 1824, 9 Wheat. 1, at p. 86, as follows:

> "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress though limited to specified objects, is plenary as to those objects, the power over

[2] "Mr. Russell. * * * The Senator speaks about a hearing before the Interstate Commerce Commission. On the notifications which are filed with the Interstate Commerce Commission, there is no hearing, unless the Interstate Commerce Commission, within a certain period of time, determines that one should be had. Unless the Interstate Commerce Commission takes affirmative action to stop the railroad's action within a certain period of time, the railroad determines such action." 104 Cong. Rec. 9762 (June 11, 1958).

> commerce * * * among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse."

The exercise by Congress of such power over interstate commerce can only be accomplished by legislation which measures the scope of the exercise of such power. Until a particular aspect in the field of interstate commerce has been regulated by congressional enactment, the States are free to exercise their police and other governmental powers therein. *Port Richmond Ferry Co.* v. *Hudson County*, 1914, 234 U. S. 317; *Colorado* v. *United States*, 1926, 271 U. S. 153. It was our recognition of the persistence of State authority until excluded from the field by congressional enactment that brought us to our conclusion in the previous litigation in these matters. *Board of Public Utility Commissioners of New Jersey* v. *United States, supra.* The Interstate Commerce Commission was created by Congress for the purpose of receiving and administering such of the congressional power over interstate commerce as was thereby delegated to it. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 1896, 162 U. S. 197, 211. Because by 49 U.S.C. § 1(18), supra, the Commission was authorized to certify that present or future public convenience and necessity permitted the abandonment of a line of railroad, including a ferry, but not a reduction or discontinuance of service upon such a line, we found that the Commission had not been empowered to authorize the discontinuance of the passenger service on the Hudson ferries while the freight service thereon was continued. Cf. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Railroad Commission of California*,

1931, 283 U. S. 380. Since we so decided, however, Congress has been heard from most emphatically and distinctly upon the subject then before us, in the language of § 5 of the Transportation Act of 1958, *supra*. By that language the congressional power over interstate commerce has been wielded directly instead of being delegated for exercise by the Commission. In that section the Congress has clearly disclosed its intention that a carrier subject to the Act, of its own initiative and without any prior authorization, either by Congress or by the Commission, might discontinue a ferry or any portion of its service operated in interstate commerce upon the expiration of thirty days after the filing, service and posting of a written notice of its intention so to do. This legislative delegation of authority to discontinue is expressly unconditionalized by the phrase "the laws or constitution of any State or the decision or order of or the pendency of any proceeding before any court or State authority to the contrary notwithstanding." At the same time, however, and in the same section, it is also provided that whenever a carrier shall avail itself of such legislative authority by indicating and publishing its intention to discontinue a service, the Commission shall have the authority, to be exercised within the same thirty day period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance of service. If, upon such investigation the Commission finds, after hearing, that the operation of such a ferry is required by public convenience and necessity and will not unduly burden interstate commerce, it may, by order, require its continuance in whole or in part for a period not to exceed one year from the date of such order. Since Congress, by virtue of its constitutionally-vested exclusive and plenary power over interstate commerce, could always have exercised it without employing the intermediary of a Commission, it can still exercise that power directly by legislative mandate without channeling such exercise through the Commission. *Southern Pacific Co.* v.

Arizona, 1945, 325 U. S. 761, 769. In the present case that is exactly what the Congress has done. It has authorized the carrier directly to discontinue service. It has not delegated to the Commission power to authorize such discontinuance, but has made such discontinuance subject to the exercise of a discretionary power by the Commission (1) to investigate the proposed discontinuance and (2) following investigation, to suspend such discontinuance after affording an opportunity to be heard to those who will be affected either by the discontinuance or by the suspension thereof. If, as we conclude, Section 13a(1) amounts to a direct authorization to a carrier subject to the Interstate Comerce Act to discontinue service, in whole or in part, of a ferry operated in interstate commerce, the constitutionality of such an Act is obvious from U. S. Const. art. I, § 8, cl. 3. *Thatcher* v. *Tennessee Gas Transmission Co.*, 5 Cir. 1950, 180 F. 2nd. 644, cert. den. 340 U. S. 829; *Pennsylvania R. R. Co.* v. *Public Service Commission*, 1919, 250 U. S. 566.

This Court has no right to say that Congress should not have authorized a carrier to discontinue service or have left to the unreviewable discretion of the Commission the determination of whether or not it should investigate the carrier's contemplated action as a preliminary to a hearing thereon looking to suspension thereof. We so construe the language of Section 13a(1), and as so construed, find it in no respects repugnant to the Fifth Amendment. See *Berman* v. *Parker*, 1954, 348 U. S. 26; *Luxton* v. *North River Bridge Co.*, 1894, 153 U. S. 525.

Plaintiff's contention that Section 13a(1) "permits the Interstate Commerce Commission to supersede State regulation of ferry service" is without support in the language used. The supercession of the State regulation is not achieved by any act of the Commission, but results from the statutorily authorized action of the carrier in electing to discontinue service. The constitutionality of such legislative authorization is well established. Cf. *Thatcher* v.

Tennessee Gas Transmission Co., supra; Eastern Motor Express v. *United States*, D. C. Ind. 1952, 103 F. Supp. 694, 702, aff'd 344 U. S. 298; *Addyston Pipe & Steel Co.* v. *United States*, 1899, 175 U. S. 211. When Congress occupies the field the State must withdraw therefrom.

Section 5 of the Transportation Act of 1958 amends "[t]he Interstate Commerce Act, as amended, * * * by inserting after section 13 thereof" the new Section 13a with which we are here principally concerned. It is argued that because Congress has directed that this new section be inserted to follow immediately Section 13 of the old Act, it intended that both sections should be read and construed together. More specifically, it is urged that the "authority" given to the Commission by Section 13a(1) "to enter upon an investigation of the proposed discontinuance * * * either upon complaint or upon its own initiative without complaint" must be exercised in an adversary proceeding as contemplated by 49 U.S.C. § 13(2), upon complaint by a State commission "in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter." 49 U.S.C. § 13 is entitled "Complaints to and investigations by Commission." The section, however, is broken down into four subdivisions. Subdivision 1 authorizes any person, corporation, body politic or municipal corporation, or any common carrier who may have a complaint "of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof" to make it to the Interstate Commerce Commission. Thereupon the Commission is required to forward a statement of the complaint to the common carrier complained against who shall be called upon either to satisfy the complaint or to answer the same in writing. If such carrier satisfies the complaint, that terminates the

proceeding. If it fails to satisfy the complaint within the time specified by the Commission "or there shall appear to be any reasonable ground for investigating said complaint" the duty to investigate is imposed upon the Commission. It will be noted that the basis for complaint is limited to an act or omission of a common carrier in contravention of the provisions of the chapter. Obviously the language of this first subdivision can have no application to our presently confronting situation, since what the defendant carrier has done here is not in contravention of the provisions of the chapter as amended by the addition of Section 13a(1). Subdivision 2 of Section 13 is closely related to subdivision 1 thereof and relates to the same type of complaint and a similar basis therefor, but the maker of the complaint contemplated by subdivision 2 is "the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission." Subdivisions 3 and 4 are obviously equally inapplicable to the facts in the case before us. The mere juxtaposition of Section 13a(1) to Section 13 is of no significance where the language of the new section requires no construction, and where the subject matter thereof is independent of and unrelated to the former. The situations contemplated by Section 13 are entirely distinct from those contemplated by Section 13a(1). The procedure prescribed for each category of situation is therefore appropriately different. The new legislation expressly authorizes the noticing carrier to discontinue the service described in the notice "except as otherwise ordered by the Commission pursuant to this paragraph, * * *". The authority of the Commission to investigate within the thirty days' period becomes effective upon the filing of the notice of discontinuance by the carrier. There is no compulsive directive that such an investigation shall be made, although the authority to make it exists irrespective of a complaint, because it may be exercised upon the Commission's own initiative in the absence of a complaint. It is not until the Commission institutes such an investigation

that it may require the carrier to continue the service "pending hearing and decision in such investigation." The Commission may require continuance or restoration of service for a maximum period of one year only when it finds "after hearing in such investigation" that the service "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce." The patent difference between the situations and procedures contemplated and prescribed in old Section 13 and new Section 13a(1) eliminates any ground for a similarity of treatment.

It is further argued by plaintiffs that the similarity of the language of Section 13a(1) to that of 49 U.S.C. § 15(7) (1952), requires a similar construction of each section with respect to the Commission's duty to accord a hearing upon the complaint of a party adversely affected by the action in contemplation. Section 15(7) expressly confers and imposes upon the Commission the power and duty to determine the lawfulness of new rates adopted by a carrier. It provides, in pertinent part, that when a carrier files a new rate schedule with the Commission, the latter "shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate * * *." In *Kenny* v. *United States*, D. C. N. J. 1952, 103 F. Supp. 971, Judge Smith of this Court construed Section 15(7) as contemplating "that the interested parties, both the carrier and protestants, shall be afforded an adequate opportunity to be heard on the merits of the controversy," i.e., whether the proposed rates were reasonable, just and lawful as the Commission elsewhere in Section 15 was authorized and directed to determine. Judge Smith further pointed out in the same case that:

> "The statute reserves to the carrier a primary right to establish tariffs but vests in the Commission the au-

> thority to determine their 'lawfulness.' * * * The burden is upon the carrier to prove not only that the proposed tariffs are 'just and reasonable' but also that they are lawful. * * * A tariff initiated by the carrier pursuant to the provisions of the Act 'must be upheld as lawful unless adequate reasons are prescribed for setting it aside.' " (Citing *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.) 103 F. Supp. at 974, *supra.*

The significant phrase in Section 15(7) is "to enter upon a hearing." Section 13a(1) on the other hand authorizes the Commission "to enter upon an investigation" and thereafter to hold a hearing to determine whether the ferry shall be continued in operation. The making of the investigation is left entirely to the discretion of the Commission; the holding of a hearing is required only after the institution of such an investigation.

The due process requirements of a hearing to determine the reasonableness and lawfulness of a proposed change in carrier rates apply by reason of the involvement in such a proceeding of substantial rights or property, both of the carriers on the one hand and of their patrons on the other. The discontinuance of service by a carrier pursuant to the direct congressional authorization embodied in Section 13a(1) poses no threat to life, liberty or property. Neither the exercise of such authorization by the carrier nor the Commission's determination not to investigate the proposed discontinuance can impair the rights, under the Fifth Amendment, either of the State of New Jersey, its Board of Public Utility Commissioners, or the users of the service to be affected. *New York* v. *United States*, 1922, 257 U. S. 591; *Addyston Pipe & Steel Co.* v. *United States, supra. Norwegian Nitrogen Products Co.* v. *United States*, 1933, 288 U. S. 294, cited by plaintiffs in this connection, is distinguishable because the requirement of a hearing in the course of the investigation prescribed by the Tariff Act of 1922 is an obviously essential protection to the property

rights involved in the prescription of tariff duties to achieve an equalization of differences in costs of production in the United States and abroad. In such a situation a hearing is essential to the performance of the executive duty imposed by the Act.

Section 13a(1) embodies a new and distinct exercise of the congressional power. Its language is clear and unambiguous and therefore neither admits of nor requires any construction by comparison with any other section or subsection of the Interstate Commerce Act, as amended.

It may be asked what remedy, if any, is available to a party affected by a discontinuance of service under the new section if it be held that the Commission may, at its discretion, refuse to investigate such a party's complaint. There is a remedy, but it is not in this Court. It has long been recognized that the Commission may be compelled to act by a proceeding in mandamus brought in the District of Columbia, where the Commission has its theoretical domicile. *Work* v. *Rives*, 1925, 267 U. S. 175. At page 184 of the last cited case, it is stated that:

> "There is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator in such cases does not ask for a decision any particular way but only that it be made one way or the other. Such are *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, and *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474."

We find no suggestion in the present record that the Commission acted arbitrarily or capriciously in deciding not to investigate the proposed ferry discontinuance. The Commission expressly reached its determination not to investigate the proposed discontinuance of ferry service upon "consideration of the records in Finance Docket No. 18781 (N. Y. Central R. Co. Ferry Abandonment, 295 I.C.C.

385 and 519) and Docket No. 32359 (Fares and Charges via Weehawken Ferry)". The evidence embodied in those dockets was presented in adversary proceedings before the Commission to which the plaintiffs, plaintiff-intervenors and the railroad were parties, and which extended over a period of more than two years in the course of which the issues of public convenience and necessity and effect upon interstate commerce with respect to the continued operation of the ferries were thoroughly explored. The report of the full Commission in the 1957 ferry abandonment proceedings was filed in May of that year, although this Court is not here concerned with the sufficiency of the evidence before the Commission to support its report and recommended certificate. Moreover, there has been no offer to show in this case that either the Commission or the railroad has been guilty of any violation of law or breach of duty which could cast suspicion upon the propriety of the Commission's determination to refrain from investigation of the railroad's proposed discontinuance of ferry service.

Indeed, the effort of the railroad to discontinue such service is invited by the wording of Section 13a(1) and its legislative history. Although dealing with a foreclosure of railroad property, Mr. Justice Holmes said, in *Bullock* v. *Railroad Commission of Florida*, 1921, 254 U.S. 513, at 520-21:

> "Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. *Brooks-Scanlon Co.* v. *R.R.Comm. of Louisiana*, 251 U.S. 396. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise the power of eminent domain. Suppose that a railroad company should find that its road was a failure, it could not make the State a party to a proceeding for leave to stop, and whether the State would proceed would be for the State to decide. The only remedy of the com-

pany would be to stop, and that it would have a right to do without the consent of the State if the facts were as supposed."

It was the same eminent Justice who wrote the *Brooks-Scanlon* opinion cited in the foregoing quotation.

Plaintiffs implicity take the anomalous position in their statement that their contention accepts arguendo the railroad's position that the Interstate Commerce Commission was not required by the Constitution or by statute to grant a hearing. Such a concession destroys the foundation for the point argued. Having concluded that a hearing was not required either by the terms of the statute or under the Constitution, the denial of such a hearing could not be arbitrary or an abuse of discretion. We do not recognize that this Court is presently called upon to determine whether the proposed ferry discontinuance finds justification in public convenience or necessity, or is in furtherance of the well-being of interstate commerce. We are confronted here by a strictly constitutional question, i.e., whether Section 13a(1) requires the Interstate Commerce Commission to hold a hearing before determining not to investigate the complaint of the plaintiff Board, and whether, in dispensing with such a hearing and concluding not to investigate, the plaintiffs' constitutional rights have been adversely affected. Whether the policy of Congress in adopting the new section is in accord with that disclosed in the Interstate Commerce Act before its amendment thereby is of no concern to a Court, and if the language of the amendment clearly authorizes the position taken by the Commission, previous congressional policy is irrelevant as a criterion of the propriety of such position.

The legislative history of the Transportation Act of 1958 indicates that it was the result of several years' consideration by the appropriate congressional committees in the fields of Transportation and Communications. The evidence presented in numerous hearings held during the

period of such consideration disclosed, among other things, that the eastern railroads of the United States were in dire financial straits, due principally to continuing losses from passenger service, particularly in the commuter service. H.Rept.No. 1922, 85th Cong. 2d Sess. (1958), 1958 U.S. Code, Cong. and Admin. News 3220. This report explains that because discontinuance of service on a line of railroad was subject to State jurisdiction, and relief in that direction had been difficult and obstructed, the House Bill, which ultimately became the new Act, "proposed to add a new section 13a to the Act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than State commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single State." Id. at 3232.

To plaintiffs' contention that they have a legally protected interest in the ferry service which the defendant railroad seeks to discontinue, the answer is simple and brief: Any interest in such service which may have existed prior to the adoption of the Transportation Act of 1958 has been explicitly made subject to the action of a carrier authorized by Section 13a(1). The previously protected interests of the plaintiffs, if any, in the continuance of the ferry service across the Hudson River arose as a result of the State's exercise, through its Board of Public Utility Commissioners, of the authority over the ferries which existed prior to the amendment. By that amendment Congress has occupied the domain of control over such service, and thereby extinguished the jurisdiction of the plaintiff Board therein. Such congressional action not only extinguishes such Board-created rights, but also any other public rights which may have resulted from the initial grants of ferry franchises and the acceptance and user thereof by the defendant railroad and its predecessors.

With respect to the plaintiff-intervenors, although they were appropriately admitted to this litigation, their rights to the continuance of the ferry service were created by, and must be deemed to have terminated with, the jurisdiction of the plaintiff Board which concededly existed prior to the adoption of Section 13a(1). When Congress enacted Section 13a(1) the rights of the plaintiff-intervenors as well as those of the original plaintiffs became conditional licenses subject to termination through the invocation by the carrier of the procedure prescribed therein.

The temporary injunction heretofore granted in this case will be dissolved and the complaint dismissed.

MCLAUGHLIN, *Circuit Judge*, dissenting

The majority opinion completely sanctions the immediate abandonment of New York Central's entire public passenger ferry service between New Jersey and New York, in operation since 1883, on the basis of a single thirty day notice of discontinuance of "all ferries across the Hudson River between Weehawken, Hudson County, New Jersey and West 42nd Street and Cortlandt Street, Borough of Manhattan, City, County and State of New York."

The notice itself is defective in substance, instead of being in strict accord with its sole statutory authority of Section 13a(1) of the Interstate Commerce Act as amended (approved Aug. 12, 1958). This, without going further, is quite enough to vitiate the attempt to eliminate the public transportation involved under Section 13a(1) but because the only possible lawful construction of the above new amendment is even more important, that will be dealt with now. The invalidity of the notice will be pointed out later.

The admitted reason for the passage of the section was our decision in *Board of Public Utility Commissioners of the State of New Jersey, et. al.*, v. *United States of America, Interstate Commerce Commission, Defendants,* and *New York Central Railroad Company,* Intervenor, 158 F. Supp.

98 (D.N.J. 1957).[1] In the effort to obtain legislation which would enable this railroad or any railroad to summarily wipe out of existence any individual train or ferry or line of trains and ferries within the reach of the amendment the all pervading effect of the immediately preceding Section 13(1) and (2) was quite apparently overlooked; in any event its authority was in nowise restricted. Section 13(1) and (2) reads:

> "Complaints to and investigations by commission.—(1) Complaint to commission of violation of law by carrier; reparation; investigation. Any person, firm, corporation, company, or associates, or any mercantile agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.
>
> "(2) Complaint by State commission; inquiry on commission's own motion. Said commission shall, in

[1] Statement to court by counsel for the New York Central Railroad Company at the hearing on the application in this suit for preliminary injunction: "I want to say to the Court * * * if you go back to the testimony before the committees, you'll find that this particular case was the reason for the enactment of this section."

like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter or relating to the enforcement of any of the provisions of this chapter. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

No language could be more broad. When 13(1) speaks of a complainant filing a complaint to the Commission, it includes these complainants and their complaints. When it states that if the carrier does not satisfy the complaint it shall be the duty of the Commission to investigate the matters complained of, it covers the matters complained of in these complaints and it left the Commission with no alternative but to so investigate. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 39 (1904). And under Section 13(a) the Commission, irrespective of the carrier satisfying the complaint, must investigate any complaint where made by a state railroad commission as here. The Commission not only did not investigate but to the contrary, affirmatively decided "not to enter upon an investigation." And that is the hard core of the case. We are dealing, not with a rate section but with "the *general* complaint and investigation provisions of Section 13(1) and (2) * * *"

as stated and emphasized by the Government and Commission in their joint brief. They cannot be eliminated. They cannot be soundly argued against. They are controlling here.

No reference is made to this palpable contretemps in the railroad brief at all. Under the circumstances that is perhaps the wisest way to handle it. The Government and the Commission first merely state that the general complaint and investigation provisions of Section 13(1) and (2) cannot be read into the specific procedural pattern of Section 13a(1). They forget for the moment that 13(1) and (2) awards complainants basic rights, not mere steps in a clause. Then they go on to make the rather unique pronouncement that "Moreover, *notwithstanding Interstate Commerce Commission* v. *Baird*, 194 U. S. 25 (1904), Section 13(1) requires the Commission to investigate a complaint (!) if 'there shall appear to be any reasonable ground for investigation, and in such case,' (2) 'by such means as it shall deem proper.' Thus, even if Section 13(1) is thought to bear a relation to Section 13a(1), the Commission was required to consider in the light of the provisions and purposes of Section 13a(1) whether there was 'reasonable ground' for an investigation beyond consideration of the extensive information which it already had (i.e., investigation 'by such means as it shall deem proper'). Thus viewed, as it must be by its terms, Section 13(1) and (2) adds nothing to the Commission's admitted duty to exercise responsibly its discretionary powers under Section 13a(1)." (Emphasis supplied).

The mandatory necessity for an investigation in every case where a complaint is filed, including those covered by Section 1, under the *Baird* opinion has already been gone into and Section 13(2) by its specific terms demands an investigation on every complaint filed under it.

Rounding out the chaos resulting from the determination to bar paragraphs (1) and (2) of Section 13 from their

dominating position with respect to 13a(1), two full pages further on the Government and Commission brief concludes as to 13a(1): "*Moreover this particular section cannot be interpreted in a vacuum. It must be viewed against the background of the entire Act.*" (Emphasis supplied). So viewed, the 13(1) and (2) investigative measures cannot be brushed aside. The final argument of the Government and Commission on this subject, the one adopted by the majority opinion and as set out in the latter, is that "* * * the basis for complaint is limited to an act or omission of a common carrier in contravention of the provisions of the chapter Obviously the language of this first subdivision can have no application to our presently confronting situation, since what the defendant carrier has done here is not in contravention of the provisions of the chapter as amended by the addition of Section 13a(1). Subdivision 2 of Section 13 is closely related to subdivision 1 thereof and relates to the same type of complaint and a similar basis therefor, but the maker of the complaint contemplated by subdivision 2 is 'the railroad commissioner or railroad commission. * * * The situations contemplated by Section 13 are entirely distinct from those contemplated by the new section 13a(1).' "

The above is in effect everything urged against the applicability of 13(1) and (2). Answering it, what the carrier has done is in direct contravention of the provisions of the chapter as amended because despite the addition of 13a(1), paragraphs (1) and (2) of Section 13 remain and they, by their terms, cover all situations, including that contemplated by 13a(1).

In addition to the above, it should be noted that, though forced to move hurriedly by the extraordinary time pressure of 13a(1), the complainants clearly made known their fundamental grievances to the Commission. The New Jersey state and public utility complaint is not confined to 13a(1). It mentions preliminarily "That said notice was issued by defendant (New York Central Railroad) under

the terms of the new Section 13a of the Interstate Commerce Act". It then goes on to say:

> "That the Commission has previously found that there are 4,000 passengers on defendant's River Division and 3,000 local ferry passengers who use the ferry service described in II above, and that to permit the discontinuance of said ferry service without public hearing and investigation would deprive the users of the ferry service of an opportunity to be heard, and would deprive them of a service for which there is no alternative. Fairness and justice require that public hearing and investigation be held to determine the question of present and future public convenience and necessity."

It prays:

> "WHEREFORE, complainants pray that defendant be required to answer the charges herein, and that the Commission enter an order requiring said ferry to be continued in operation or service, pending public hearing and investigation and a decision by the Commission as to whether present and future public convenience and necessity require the continuation of said ferry service, and will not unduly burden interstate commerce, and that such other and further order or orders be made as the Commission may consider proper in the premises."

And the complaint in this cause, filed within a few days thereafter (Sept. 4, 1958) by New Jersey and its Public Utility Commission, inter alia charged *"The Commission is obligated by law, particularly by 49 U.S.C. 13(2), to investigate any complaint filed with it by the railroad regulatory agency of a state."* (Emphasis supplied).

Nor did the complaint filed with the Commission by the intervenor plaintiffs accept 13a(1). It protested that abandonment of the ferry system was still subject to Section 1(18) of the Act which like 13(1) and (2) had not been repealed. It strongly insisted that material changes in ferry service and rates had lately occurred and needed

scrutiny on the issue of public convenience and necessity. Attacking the specific method employed by the railroad under 13a(1), it stressed the invalidity of its notice and consequently the abortive character of the proceeding. It detailed a series of constitutional objections both to 13a(1) and to what had happened under the cloak of following its directives. Lastly, it prayed for an investigation and a hearing as to whether public convenience and necessity permit the discontinuance of the ferries and whether their continuance would unduly burden interstate commerce.[2]

The net result of all of the above is that Section 13 of the Interstate Commerce Act, granting reasonable protection to states and citizens against the sort of power play revealed in this litigation, still stands and still beautifully illustrates the original high purpose of the Act. Under it these plaintiffs are entitled definitely to a real investigation, and, I think, to a hearing on their charges, before these ferries are sunk without a trace.

Defective Notice

The statute, (13a(1)), plainly never contemplated a valid notice of discontinuance of the entire New York Central Hudson River ferry service to consist of two words, "all ferries". The notice of discontinuance indicated is to cover specifically each train or ferry to be abandoned. The section speaks of "proposed discontinuance or change, in

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[2] The majority opinion discourses at some length on the non-applicability of Section 15(7) since that is directly related to rates and cites Kenny v. United States, 103 F. Supp. 971 (D.N.J. 1952). That section was referred to by plaintiffs as showing similarity of treatment (which is does) with the conclusion that the language of 13a(1) was probably to a large extent adapted from 15(7). A reading of the two sections tends to confirm this thought.

The fact that 13a(1) was properly inserted into the Interstate Commerce Act immediately following its parent Section 13 increases the difficulty of ignoring the presence of the general pervading law. It is one more incident illuminating the relationship 13a(1) bears to 13(1) and (2).

part or in whole, of the operation or service of any train or ferry operating from a point in one State to a point in another State." It then refers to "such train or ferry". As used, the word "train" has its normal meaning, one transportation unit. It is not to be twisted into denoting a line of railroad. Nor is "ferry" in the text to be converted from a single vessel to the New York Central fleet of ferries. It is one of the strange features of this dispute that the Interstate Commerce Commission's own interpretation of the kind of notice required by Section 13a(1) is steadfastly ignored. *Two days after the amendment was approved, the Commission issued its rules and regulations under it and these provided that "A separate notice, shall be given in respect of each train or ferry concerning which a discontinuance or change of operation is proposed."* (Emphasis supplied.) This was the necessary interpretation called for by the statutory language. Nevertheless the Commission permitted the vitally defective notice to effect the destruction of the whole public passenger Hudson River ferry system of the defendant railroad, all, according to the Commission and the railroad, without recourse.

This lack of compliance with even the scant notice provisions of 13a(1) is sufficient to reveal the ruthlessness of the effort to forthwith abandon the ferry service and more than sufficient to justify the affirmative action of this court to prevent such action, at least until a decent respect for the rights of the plaintiffs has been observed.

Is Section 13a(1) Unconstitutional?

It would seem most doubtful that the problem of unconstitutionality will arise, but by reason of the dangerous endeavor to down grade this most serious question it should be briefly presented in its true light.

Because the defendant railroad was thwarted in its maneuver to close out its ferry operation under non-existent jurisdiction of the Commission, Section 13a(1) came into

being. Its avowed purpose was to cut off an important public transportation artery which the New York Central originally had voluntarily sought and obtained and of which it has had exclusive possession since 1883. Under it the carrier was to be able to discard this utility, because of the claim that it was no longer profitable or for no reason and without the semblance of a hearing to the states, their components and the citizens affected. On this theory, New York, New Jersey, their counties, towns and people have no right to be heard in opposition. Substantially, it is considered perfectly proper for the railroad to have obtained these ferry franchises, operated under them in such fashion that, combined with other essential elements, i.e., changing transportation, etc., they are now alleged liabilities and thereupon, ex parte, eliminate the entire ferry system without one slight gesture of adequate substitution means of travel to the people who have become dependent on the service through the years. Currently changed conditions are the fact. Long overdue economic efficient methods, higher fares and the like have bettered the railroad's position. How much this amounts to is not to be guessed at but should not remain hidden. Ferry riders have decreased but so has the service, both in quantity and quality. As an absolute minimum the status of public passenger water surface transportation between New York City and most of the United States cries for a fair hard look before this strange, dismaying law is allowed to write an end to that transportation in peace and in war.

The deliberate deprivation of hearing could not have been motivated by fear, for the railroad protests the rightness of its attitude. It could not have been on account of some possible temporary delay arising from a hearing, for the operation is over half a century old and the Commission could pass upon the issue promptly. Apparently it was just that the railroad wanted it that way, and one thing is certain, namely, that the public was ignored in the formulation of the amendment 13a(1). I have therefore grave

misgivings about the justice of the statute for the Fifth Amendment also protects states and their subdivisions and their citizens.

Remedy

Some mention should be made of remedy because of the various confusing suggestions at the hearing.

If the Commission has been wrong in law by construing 13a(1) as some sort of sui generis authority (instead of as an integral part of the Act, which it is, and as such governed by the general all inclusive provisions of 13(1) and (2)) the injunction should be made permanent and the case sent back to the Commission to dispose of properly under 13(1) and (2). Dismissal of the suit for lack of jurisdiction, coupled with the prior thought that the plaintiffs could seek a mandamus remedy in the District of Columbia, is not at all indicated. A simple mistake of law has been made and it is up to the Commission to rectify it. The same practice would apply to a decision based on defective notice. If the matter were to be so returned to the Commission, the latter would be directed to set aside the notice which latter action would automatically end the present proceeding.

APPENDIX B

INTERSTATE COMMERCE COMMISSION
WASHINGTON

Finance Docket No. 20291

NEW YORK CENTRAL RAILROAD COMPANY—DISCONTINUANCE OF SERVICE—WEEHAWKEN FERRY

Notice

Various letters and telegrams have been received requesting suspension of a proposed discontinuance of operation, effective 12:01 a.m., September 13, 1958, of all ferries

of the New York Central Railroad Company across the Hudson River between Weehawken, N.J., and West 42d Street and Cortlandt Street in New York, N. Y., pursuant to a notice filed August 13, 1958, by the said railroad company under section 13a(1) of the Interstate Commerce Act, as amended by the Transportation Act of 1958.

The Commission, upon consideration of the matters involved, including consideration of the records in Finance Docket No. 18781 (*New York Central R. Co. Ferry Abandonment*, 295 I.C.C. 385 and 519) and Docket No. 32359 (*Fares and Charges Via Weehawken Ferry*), has concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued, in whole or in part.

By the Commission.

HAROLD D. McCOY,
Secretary.

August 26, 1958.

APPENDIX C

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2nd day of September, A.D. 1958.

Finance Docket No. 20291

NEW YORK CENTRAL RAILROAD COMPANY—DISCONTINUANCE OF SERVICE—WEEHAWKEN FERRY

It appearing, That on August 13, 1958, The New York Central Railroad Company filed with this Commission a notice under section 13a(1) of the Interstate Commerce

Act, as amended, that effective 12:01 a.m. September 13, 1958, said carrier will discontinue operation of its ferries across the Hudson River between Weehawken, Hudson County, N. J., and West 42d Street and Cortlandt Street in New York, N. Y.;

It further appearing, That the Commission after receipt of numerous letters and telegrams protesting the proposed discontinuance, on August 26, 1958, served a notice announcing that it had concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued in whole or in part;

It further appearing, That since making the above-mentioned announcement additional complaints and petitions for reconsideration have been filed, including a petition of the Railway Labor Executives' Association requesting that conditions be imposed for the protection of employees who may be affected by the proposed discontinuance;

It further appearing, That questions are presented as to the effect the discontinuance will have upon employees of the said New York Central Railroad Company and the conditions, if any, which should be imposed for their protection and benefit;

It further appearing, That, upon consideration of the provisions of section 13a(1) of the Interstate Commerce Act limiting the time available for investigation and decision, the due and timely execution of this Commission's functions in this proceeding imperatively and unavoidably requires the omission of an examiner's recommended decision herein;

It is ordered, That an investigation of said proposed discontinuance of the ferry operations described be, and it is hereby, instituted under the provisions of section 13a(1) of the Interstate Commerce Act, solely to determine the

conditions if any, which should be imposed for the protection of employees affected thereby;

It is further ordered, That said proceeding be, and it is hereby, assigned for hearing at a time and place hereafter to be designated;

It is further ordered, That a recommended decision by the examiner to whom the investigation is assigned for hearing be omitted as part of the decision making process in this proceeding;

And it is further ordered, That the said petitions for reconsideration are denied in all other respects except as hereinabove granted.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1002-58.

Final Order and Decree

The above-entitled cause having come on to be heard on the 3rd day of November, A.D. 1958 before a three-judge Court duly constituted, and all parties thereto having appeared by counsel, and the Court having before it the pleadings, the evidence, and the briefs and arguments of counsel, and upon due consideration thereof after having taken the cause under advisement, and written opinions having been filed herein on the 25th day of November, A.D. 1958, and the majority opinion of this Court containing the Court's findings of fact and conclusions of law, and it appearing to the Court that the plaintiffs and the several plaintiff-intervenors are not entitled to the relief prayed for in their complaints, it is:

ORDERED ADJUDGED AND DECREED, that the complaints filed by the plaintiffs and the plaintiff-intervenors are hereby dismissed on the merits and that the preliminary injunction heretofore granted and issued by this Court herein and entered in the Office of the Clerk of this Court on the 12th day of September, A.D. 1958, is hereby dissolved and terminated.

Each party to this action shall bear his own costs.

Signed this 4th day of December, A.D. 1958.

By the Court.

WILLIAM F. SMITH
District Judge

REYNIER J. WORTENDYKE, JR.
District Judge

JUDGE MCLAUGHLIN dissents.

APPENDIX E

Principal provisions of the Interstate Commerce Act 49 U.S.C., involved in this proceeding:

Sec. 1(18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the

commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) *Application for certificate of commission; notice and hearing.* The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

* * * * * * * * * * *

Sec. 13. Complaints to and investigations by commission.—(1) *Complaint to commission of violation of law by carrier; reparation; investigation.* Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such

common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Complaints by State commissions; inquiry on Commission's own motion; expenses of State commissions

(2) Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commis-

sion, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

* * * * * * * * * * *

Sec. 13a. Discontinuance or change of the operation or service of trains or ferries; notice; investigation; hearing; determination

(1) A carrier or carriers subject to this chapter, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective,

may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days

from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph. Feb. 4, 1887, c. 104, Pt. I, § 13a, as added Aug. 12, 1958, Pub. L. 85-625, § 5, 72 Stat. 571.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 621

STATE OF NEW JERSEY and BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

No. 622

COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD and THE TOWNSHIP OF TEANECK; and CITIZENS UNITED TRANSIT COMMITTEE,
Plaintiff-Intervenors-Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM FINAL JUDGMENT AND DECREE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 621

STATE OF NEW JERSEY and BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

No. 622

COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD and THE TOWNSHIP OF TEANECK; and CITIZENS UNITED TRANSIT COMMITTEE,
Plaintiff-Intervenors-Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM FINAL JUDGMENT AND DECREE

Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, The New York Central Railroad Company,

appellee, moves that the final judgment and decree below be affirmed on the ground that the questions presented by the above appeals are so unsubstantial as not to need further argument.

Statement of the Case

These are direct appeals, No. 621 by the State of New Jersey and its regulatory commission (the original plaintiffs) and No. 622 by a number of communities and a commuters' association (plaintiff-intervenors), from a final judgment and decree dated December 4, 1958 of a three-judge District Court. Said decree (one judge dissenting) dismissed this action which had been brought in the District of New Jersey to bar discontinuance by the Railroad, pursuant to recently enacted Section 13a.(1) of the Interstate Commerce Act, of operation of its losing trans-Hudson ferries.

(a) **The Railroad's prior Section 1(18) application in respect of its interstate ferries.** The Railroad's prior application under Section 1(18) of the Interstate Commerce Act is an important part of the background of the present case and is discussed in both jurisdictional statements and in the opinions below.

Since 1954, the Railroad has been seeking to terminate the operation of its trans-Hudson ferry lines because, on an out-of-pocket basis, they were and are losing about $1,200,000 a year. After extensive hearings and briefs before an Examiner of the Interstate Commerce Commission and further briefs and oral argument before Division 4, the Commission in

September 1956, pursuant to Sections 1(18)-(20) of the Interstate Commerce Act, granted to the Railroad a Certificate of Public Convenience and Necessity which permitted abandonment of these ferry lines. In granting the Certificate, Division 4, among other things, found (295 I. C. C. at p. 405) "that reasonably adequate and convenient substitute service is available for those who now travel to Manhattan via Weehawken".* The Division 4 opinion said further (295 I. C. C. at p. 411): "We find that the railroad-ferry service has become outmoded and unnecessary as a direct consequence of a preponderant portion of the public who once relied upon the applicant's service having adapted their riding habits to the use of alternative modes of transportation."** After another round of briefs and oral argument, the full Commission affirmed the Division 4 decision (295 I. C. C. 519, May 1957).

The parties who are appellants here having brought an action to set aside the order of the Commission, the District Court in December 1957 ruled that, since freight service of the Railroad would continue by other facilities and routes across the Hudson River between Weehawken and New York City after cessa-

* The substitute service referred to, so far as the 3,000 present rail-ferry passengers are concerned, is from their home stations and does not cover merely the ferry ride from Weehawken to New York City. As to the remaining 1,300 present ferry passengers who arrive at the Weehawken ferry terminal by bus or car rather than by rail, the substitute service referred to would involve their taking the bus or car to another of a number of connections for New York City. The appellants' repeated efforts to emphasize the fact that no ferries other than those of the Railroad operate between its termini at Weehawken and New York City is pointless; by so restricting their vision solely to the routes between these termini, the appellants lose sight of the reality that the substitute service which the Commission found to exist lies elsewhere.

** Since the date of the above opinion, the number of users of the Railroad's ferries has continued to decline steadily.

tion of operation of the Railroad's two passenger ferry lines, such cessation of operation of the ferry lines would constitute only a partial discontinuance of service and not an abandonment of a line. Therefore, because the Commission has jurisdiction under Sections 1(18)-(20) only to authorize a railroad to "abandon all or any portion of a line", the District Court set aside the Commission's order as beyond its jurisdiction. The Railroad appealed that decision to this Court (No. 41, Oct. Term, 1958) which noted probable jurisdiction (357 U. S. 917).*

Because relief to the Railroad under Section 1(18) may be impossible and at least is likely to be long delayed, the Railroad has since sought to avail itself of the much faster alternative remedy recently made available to it by the enactment in August 1958 of new Section 13a.(1) of the Interstate Commerce Act. The present appeals concern that new Section.

(b) **Legislative history of Section 13a.(1).** The legislative history of the Transportation Act of 1958 (passed as stated therein "to strengthen and improve

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* If the District Court had in the Section 1(18) case passed upon the merits, both the jurisdictional issue and the evidentiary issue could have been disposed of by this Court in one ensuing appeal without undue delay. However, the District Court, because of its jurisdictional decision, refused (158 F. Supp., at pp. 103-4) to decide the merits (although saying that it had serious doubts as to the sufficiency of the evidence). Thereby the District Court postponed indefinitely the possibility of any relief to the Railroad under Section 1(18); for, if this Court should thereafter reverse the District Court solely on the jurisdictional issue, further proceedings on the merits would be necessary in the District Court (and perhaps before the Commission also, since the appellants are already claiming that the voluminous Commission record has become stale because of the very delays created by their own litigation), with the likelihood of a second appeal to this Court after the District Court decision on the evidentiary issue.

Of course, granting of the present motion to affirm would make the Section 1(18) appeal moot.

the national transportation system") demonstrates that Section 13a.(1) (added to the Interstate Commerce Act thereby) was designed by Congress as a means of meeting the critical emergency which it found to exist in the railroad industry. Congress having found that the railroads—and particularly the Eastern railroads which have a relatively large proportion of passenger business—were sliding toward bankruptcy, it concluded that, in the national interest, means must be devised to check the impending catastrophe before it was too late.*

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* The following is an excerpt from the Senate Subcommittee Report dated April 30, 1958, as adopted by the full Senate Committee on Interstate and Foreign Commerce (S. Rep. No. 1647, 85th Cong., 2d Sess. (1958)):

> "A most serious problem for the railroads is the difficulty and delay they often encounter when they seek to discontinue or change the operation of services or facilities that no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses entailed. The subcommittee believes that the maintenance and operation of such outmoded services and facilities constitutes a heavy burden on interstate commerce." (p. 21)

Two short excerpts from the Report dated June 18, 1958, of the House Committee on Interstate and Foreign Commerce (H. R. Rep. No. 1922, 85th Cong., 2d Sess. (1958)) follow:

> "• • • The overall passenger deficit is estimated by the Interstate Commerce Commission as now amounting to $700 million annually. For the railroads to show any net income at all, accordingly, revenues from freight must be sufficient to offset such losses. With decline in freight traffic, the difficulty of making such offsets is accentuated, • • • (p. 8)
>
> "The committee is fully conscious of its responsibilities in the transportation field, and the need for the maintenance of a sound common carrier transportation system adequate for the demands of our economy and the requirements of our national defense. The committee is convinced, from the hearings and studies it has conducted for some time now that something must be done, and now must be done quickly, in the legislative field, if our common carrier transportation system is to be preserved in a position where it can continue to meet what is required of it." (p. 9)

After months of hearings, full debate on exhaustive committee reports and action by a conference committee, the Transportation Act of 1958 was passed by a vote of 348 to 2 in the House and by a voice vote in the Senate.

It is not too much to say that Congress had in mind these ferry operations as an example of the passenger services which it expected to be discontinued under the summary provisions of Section 13a.(1).* If Congress had constitutional power to legislate as it did, that intention must be given effect; and we think it unquestionable, as will be developed later herein, that Congress had such power.

(c) **Application of Section 13a.(1) to this case.** A copy of Section 13a. is annexed hereto as Appendix I. Section 13a.(1) provides that if a carrier's rights with respect to discontinuance or change of operation of any interstate train or ferry are subject to an order of "any court or an administrative or regulatory agency of any State" then, upon following the prescribed procedure and in the absence of interposition by the Interstate Commerce Commission, the discontinuance or change may take place notwithstanding such State order. The record shows that the New Jersey regulatory board has entered an order requiring continuance of operation of these interstate fer-

* Note the use of the word "ferry" in Section 13a.(1). The Hudson River ferries were the only ferries which were in issue in 1958 in the hearings before the Congressional Subcommittees. In earlier provisions of the Interstate Commerce Act, "railroad" lines and not "ferries" were specified; and railroad "ferries" were covered by such "railroad" provisions only because of the general definition in Section 1(3)(a) which included "ferries" in the term "railroad" for the purposes of the Act. But Congress had these Hudson River ferries so much in mind when it enacted Section 13a.(1) that it used the specific term "ferry" therein.

ries, and that a New Jersey Court has entered an order enforcing the board's order. Such attempted regulation by the State of these interstate ferries fits squarely within the provisions of Section 13a.(1).

Promptly after enactment of the Transportation Act of 1958, the Railroad on August 13, 1958 filed, served and posted the notice required by Section 13a.(1) of a proposed discontinuance of its trans-Hudson ferry operations on September 13, 1958. On August 26, 1958 the Commission issued a notice that it had concluded not to require the ferry service to be continued and it reiterated that conclusion in an order dated September 2, 1958.

The appellants (which had filed complaints with the Commission) thereupon brought this action. After a hearing on November 3, 1958, the District Court later in November 1958 handed down opinions in which a majority of the Court sustained the constitutionality of Section 13a.(1) and directed that the complaints of the plaintiffs and of the plaintiff-intervenors be dismissed. The District Court entered its decree on December 4, 1958 (one judge dissenting) and at the same time (a different judge dissenting) stayed, without bond, the effectiveness of its decree pending appeal to this Court from the final decree. Accordingly, while this appeal is pending, the Railroad continues to lose over $1,200,000 a year as a result of these continued ferry operations.*

* Section 13a.(1) provides that the Commission must act within 20 days to require continuance of a train or ferry by a preliminary order and also that, if the Commission does so act, its preliminary order cannot be effective for more than four months. Both these time limitations have expired; but the Railroad is nevertheless still being required to continue operation of its losing interstate ferries contrary to the will of Congress so clearly expressed in Section 13a.(1).

ARGUMENT

The complaints were framed on two theories, first, that the appellants were attacking the constitutionality of the provisions of Section 13a.(1) which are here involved, and, secondly, that they were seeking to review an order of the Interstate Commerce Commission.

We contend (a) that the meaning and intent of Section 13a.(1) plainly are that the Interstate Commerce Commission is to have unreviewable discretion whether to interpose pursuant to that statute to investigate a proposed discontinuance of interstate train or ferry operations, (b) that, so construed, Section 13a.(1) presents no constitutional difficulties whatever, (c) that the appellants clearly have no standing to challenge the constitutionality of the statute, and (d) that the grounds on which the minority opinion rests are on their face unsound.

(a) **The meaning and intent of Section 13a.(1) plainly are that the Interstate Commerce Commission is to have unreviewable discretion whether to interpose thereunder.** The legislative history summarized above shows that a prime purpose of Congress, in enacting this emergency legislation, was to afford the railroads the prompt relief from deficit interstate operations which they need in order to continue to exist under private ownership. Accordingly, the language and framework of Section 13a.(1) make clear the Congressional intent that a conclusion of the Commission, in its discretion, not to assert in a particular case the limited veto power granted to it by that Section was to be final and unreviewable.

Section 13a.(1) provides that the Commission shall neither prevent a proposed discontinuance nor order restoration unless the Commission enters upon an investigation thereof within the initial 30-day period. Only if the Commission enters upon an investigation within that limited period does Section 13a.(1) require a hearing and findings, and then only as a necessary basis for the Commission's ordering continuance or restoration of the service. The intentional contrast between the Section 13a.(1) situations where hearings and findings are required and those where they are not is plain from the statute.*

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* The State's jurisdictional statement relies on the provision of Section 13a.(1) which authorizes the Commission to enter upon an investigation within 30 days and thereafter to hold hearings in connection therewith. The State (*e.g.*, p. 28) seeks to torture this *authorization* into a statutory *requirement* that the Commission hold hearings in all cases. But the lack of merit in the State's contention is demonstrated by the statute itself. The preceding sentences of Section 13a.(1) make it clear beyond question that the provision for an investigation is permissive and not mandatory—for the statute provides explicitly that the carrier may effect the discontinuance within 30 days unless otherwise ordered by the Commission. The State (p. 25) itself concedes that Section 13a.(1) "may be literally read as permissive and as vesting the Commission with discretion to deny a hearing". The intervenors make a similar concession when they say (p. 24): "The statute does not require the Commission in deciding not to institute an investigation to base its decision upon substantial evidence in the record before it, nor does it require the Commission to make any basic findings of fact to support its decision".

The State also puts its contention in another way—it asserts (p. 14) that Section 13a.(1) is subject to the same hearing requirements as Section 1(18). In this manner, notwithstanding the entirely different terms of the two statutes, the State seeks to import into Section 13a.(1) the interminable delays which have prevented the Railroad's Section 1(18) ferry proceeding, commenced in 1954, from coming to fruition. It was to prevent such delays that Congress enacted Section 13a.(1) with its greatly restricted time limits; by its contention the State is seeking to frustrate the clear will of Congress.

No possible construction of the statutory provisions can find in them any intention that, within the 30-day time limit imposed by Congress, the Commission must hold hearings and make findings to support its conclusion not to enter upon an investigation or that, within the same limited period, the Courts are authorized to review a conclusion by the Commission that it should not enter upon an investigation. Certainly, no hearings (with attendant findings and subsequent Court review) could possibly be completed in 30 days (or even 10 times 30 days in a bitterly contested proceeding like the present one). And the contention of the appellants that there can be no summary action by the Commission as provided in the statute and that the Commission must hold hearings in all cases seeks to strike from the statute an entire and vital portion.*

That Section 13a.(1) was intended to permit summary action by the Commission without hearings or Court review is confirmed by express statements on the Senate floor (*e. g.*, 104 Cong. Rec. 9762, 9749-50 (Daily Ed. June 11, 1958)). This is also conceded in the plaintiffs' complaint which bases its contention of unconstitutionality on the failure of Section 13a.(1) to require, as a basis for concluding not to interpose, a "public hearing, findings of fact, or

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* Both the jurisdictional statements (State, p. 3; intervenors pp. 16-18) make the additional contention that Section 10 of the Administrative Procedure Act (5 U. S. C. § 1009) provides for review by the Courts of the Commission's refusal to interpose. Section 10 contains its own refutation of this contention. It specifically excepts from judicial review those cases where Congress has intended to preclude such review or to confide the matter to agency discretion (*Panama Canal Co.* v. *Grace Line, Inc.*, 356 U. S. 309, 317 (1958)).

any other reasonable safeguard against arbitrary action". Accordingly, no construction of Section 13a.(1) to require hearings and Court review in respect of Commission failure to interpose thereunder is at all possible.* If the plaintiffs have no sound constitutional objection to these explicit statutory provisions, there can be no basis for their appeal.

(b) **Section 13a.(1) presents no constitutional difficulties.** No challenge has been, or can be, made to the power of Congress to supersede State regulation of interstate commerce.** The Congressional power over interstate commerce is complete and plenary and

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* While the statute makes the Commission's refusal to investigate unreviewable, it is of interest that the majority opinion in the District Court expressly found "no suggestion in the present record that the Commission acted arbitrarily or capriciously in deciding not to investigate the proposed ferry discontinuance" and that the dissenting opinion contains no statement to the contrary. In view of the extended Commission hearings and reports in the Section 1(18) and the more recent rate proceedings relating to the ferries, and in view of the series of prior cases going back to *Central R. R. of N. J. Trustees Ferry Abandonment*, 249 I. C. C. 269 (1941), in which the Commission has authorized abandonment of trans-Hudson ferry lines of other railroads, one can hardly imagine a Section 13a.(1) case where the Commission would have more extensive information about the subject-matter than was available to it with respect to these ferries. Also, in connection with operations of interstate railroads generally, it is part of the Commission's duties under the Act to keep currently informed as to such operations and it regularly receives reports from the New York Central and the other railroads as to their operations.

** The State's jurisdictional statement says (p. 14) that "The State and Board do not challenge the right of Congress to regulate in the instant case and to provide for a definitive national transportation policy;" and says further (p. 15) that "New Jersey is not asserting that Congress has invalidly taken away its historic right to regulate ferry service across the Hudson River by the Transportation Act of 1958". However, the State's attempted

cannot be limited or restricted by the action of any State.

Gibbons v. *Ogden*, 9 Wheat. (22 U. S.) 1, 196-7 (1824);
The Minnesota Rate Cases, 230 U. S. 352, 398 (1913);
New York v. *United States*, 257 U. S. 591, 600-1 (1922);
Colorado v. *United States*, 271 U. S. 153, 165 (1926);
Chicago v. *Atchison, Topeka & Santa F. R. R.*, 357 U. S. 77, 87-8 (1958).

And the intervenors' jurisdictional statement concedes that Congress intended by Section 13a.(1) to exercise its paramount power for it states (p. 22): "There seems to exist little doubt but that with Section 13a(1) Congress did indeed intend to preempt the field, thereby ousting state jurisdiction".

However, both jurisdictional statements claim that failure of Section 13a.(1) to require the Commission to hold hearings before concluding not to interpose violates the Fifth Amendment.

We should first point out that the proposed discontinuance of the ferry service is based on authorization received by the Railroad from Congress—not from the Commission. Under Section 13a.(1), the

challenge of the validity of Section 13a.(1) as written runs counter to these concessions.

Despite the above-quoted concessions, both the jurisdictional statement of the State (p. 20) and that of the intervenors (p. 7) rely also, in connection with their constitutional claim, on their assertions that the Railroad operates its ferries under State franchises. But it has been expressly held by this Court that this presents no obstacle to exercise of the federal paramount power over interstate commerce (*Colorado* v. *United States*, 271 U. S. 153, 165 (1926)).

Commission has no power to authorize a discontinuance; all it can do is to interpose a veto, and then only a temporary one. Where, as here, the Commission has in its discretion concluded not to exercise its limited veto power, the Commission is no longer involved in any way and the Railroad, in effecting the discontinuance, is thereupon acting under direct authorization embodied in the legislation passed by Congress.* Other legislation enacted by Congress for the purpose of removing a burden on interstate commerce has been upheld by this Court in the face of Fifth Amendment objections.

New York v. *United States,* 257 U. S. 591, 601 (1922);

Louisville & Nashville R. R. v. *Mottley,* 219 U. S. 467, 482 (1911);

Union Bridge Co. v. *United States,* 204 U. S. 364, 400 (1907).

A relatively recent and controlling decision on this due process point is *American Trucking Assns.* v. *United States,* 344 U. S. 298, 322-3 (1953).

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* This is succinctly stated in the opinion of the Court below (Appendix A, State's jurisdictional statement, p. 38) as follows:

"Section 13a(1) clearly leaves to the absolute discretion of the Commission the determination of whether or not it, upon receipt of a complaint directed against a railroad's notice of intention to discontinue service, shall make any investigation of the matter or avail itself of its temporary veto power by way of suspension within the limitations of the Act. The Act is self-implementing insofar as it affords authorization to a carrier to discontinue service. No provision is made for any action of the Commission to render such authorization effective. The efficacy of the congressional authorization is in no respect dependent upon any action on the part of the Commission."

It is also impossible to see any basis for assertion by a State of a due process objection under the federal Constitution to duly enacted federal legislation concededly intended to withdraw from the State the power to regulate a particular area of interstate commerce.

Moreover, even in those cases where action by an administrative agency is specifically required by the statute involved, the Fifth Amendment does not, as the appellants contend, require that there be in all cases hearings, findings and Court review. In numerous cases where the Courts have found Congress to have intended by statute to authorize an agency to take discretionary action thereunder—action which was to be final and unreviewable—the grant of such absolute discretion to the agency has been upheld.

For example, this Court recently held in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U. S. 309 (1958), that Congress had vested in a government agency absolute discretion to fix tolls for use of the Panama Canal and that the Courts could not review its refusal to initiate a proceeding for readjustment of the tolls as sought by users of the Canal.*

* The Court said (pp. 317-8):

"Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, excludes from the categories of cases subject to judicial review 'agency action' that is 'by law committed to agency discretion.' We think the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co. * * * These are matters on which experts may disagree; they involve nice issues of judgment and choice. *New York* v. *United States*, 331 U. S. 284, 335, which require the exercise of informed discretion. * * * Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake

Similarly, refusal of the National Labor Relations Board or its general counsel to institute complaint proceedings under the National Labor Relations Act is not subject to review by the Courts, even though such refusal leaves the complainant without remedy.

Labor Board v. *I. & M. Electric Co.*, 318 U. S. 9, 18 (1943);

Amalgamated Workers v. *Edison Co.*, 309 U. S. 261, 268-9 (1940);

National Labor Relations Board v. *Lewis*, 249 F. 2d 832, 838 (9th Cir. 1957), *aff'd*, 357 U. S. 10 (1958);

Manhattan Const. Co. v. *National Labor Relations Bd.*, 198 F. 2d 320 (10th Cir. 1952);

Lincourt v. *National Labor Relations Board*, 170 F. 2d 306 (1st Cir. 1948);

Jacobsen v. *National Labor Relations Board*, 120 F. 2d 96, 100 (3d Cir. 1941).

Likewise, the Courts have no power to direct the Securities and Exchange Commission to enter upon an investigation under the Securities Act of 1933 (*Crooker* v. *Securities and Exchange Commission*, 161 F. 2d 944, 948-9 (1st Cir. 1947); *Leighton* v. *Securities and Exchange Commission*, 221 F. 2d 91 (D. C. Cir. 1955), *cert. denied*, 350 U. S. 825 (1955).

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of law, then judicial relief is often available. • • • But where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. See *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *Kadrie*, 281 U. S. 206, 219; *United States ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 62-63. We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision."

An analogous situation is involved in the line of cases holding that, under Section 15(7) of the Interstate Commerce Act, the Commission's refusal to suspend the effectiveness of newly filed tariff rates is not reviewable.

> *Board of Railroad Commissioners* v. *Great Northern Ry.*, 281 U. S. 412, 429 (1930);
> *Carlsen* v. *United States*, 107 F. Supp. 398 (three-judge Court S. D. N. Y. 1952);
> *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495 (three-judge Court E. D. Va. 1935).*

National Mediation Board certification pursuant to the Railway Labor Act of a particular union as bargaining agent has also been held final and not subject to review.

> *Switchmen's Union* v. *Board*, 320 U. S. 297, 303-4 (1943);
> *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320

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* The State (pp. 22-6) tries to use Section 15(7) to support its argument that Section 13a.(1) should be construed to require hearings in all cases. Not only would such construction be squarely contrary to the terms of Section 13a.(1), but Section 15(7) lends no assistance to the State's argument. There is no requirement under Section 15(7) that the Commission hold hearings whenever any new rate is filed; on the contrary, under Section 15(7) the Commission has absolute discretion not to take any action whatever in respect of a newly filed rate, and the shipper can then challenge the reasonableness of such rate only by invoking other Sections of the Act. Accordingly, under Section 15(7), the Commission has the same absolute discretion to refuse to interpose as it has under Section 13a.(1).

U. S. 715 (1943), *reversing* 137 F. 2d 817 (D. C. Cir. 1943).*

In connection with their due process contention, the appellants cite various cases which are simply not in point. The largest group of such inapplicable cases relied on by appellants (*e. g., Interstate Commerce Commission* v. *Louisville & N. R. R.*, 227 U. S. 88 (1913)) consists of those where Congress has required a hearing as a basis for administrative action and a hearing has not been accorded or has not been properly conducted. Where the right to a hearing is given by statute, these cases cited by appellants hold that there must, of course, be a fair hearing. But, in the present case, Congress did not provide for a Commission hearing as a prelude to its concluding whether to investigate and hold hearings—it obviously intended that the Commission's conclusion whether to interpose should be reached without a

* Similar holdings that administrative action was final and unreviewable have been made with respect to whether a taxpayer is entitled to a special assessment under the Revenue Act of 1918 (*Williamsport Co.* v. *United States*, 277 U. S. 551 (1928)); with respect to Interstate Commerce Commission certificates as to amounts owing by the United States to the railroads (*Great Northern Ry.* v. *United States*, 277 U. S. 172, 182 (1928); *Butte, A. & P. Ry.* v. *U. S.*, 290 U. S. 127, 142 (1933)); with respect to refusal of State officials to take action in reference to claimed insanity of persons condemned to execution (*Solesbee* v. *Balkcom*, 339 U. S. 9, 13 (1950); *Caritativo* v. *California*, 357 U. S. 549 (1958)); with respect to a determination by the President under the flexible tariff provisions of the Tariff Act of 1930 (*United States* v. *Bush & Co.*, 310 U. S. 371, 380 (1940)); and with respect to determination of the Foreign Claims Settlement Commission concerning distribution to American citizens of funds received from Yugoslavia (*De Vegvar* v. *Gilliland*, 228 F. 2d 640 (D. C. Cir. 1955) *cert. denied*, 350 U. S. 994 (1956); *American and European Agencies, Inc.* v. *Gilliland*, 247 F. 2d 95 (D. C. Cir. 1957) *cert. denied*, 355 U. S. 884 (1957)).

hearing. Therefore, the cases on how hearings must be conducted in situations where hearings are required by statute are not relevant here where Congress clearly intended otherwise and there is no sound constitutional objection to effectuation of the Congressional intent.

Another inapplicable type of case (*e. g., Harmon* v. *Brucker*, 355 U. S. 579 (1958)) is one where a commission has proceeded in violation of the letter of the statute involved or has exceeded its authority thereunder. Such a case where a commission has disobeyed a statutory mandate or has ignored a statutory limitation is of course entirely different from the present case where the Commission has acted strictly in accordance with the terms of the relevant statute.

The intervenors (but not the State or its regulatory board) also argue (pp. 23-5) that Section 13a.(1) constitutes an invalid delegation of legislative power and in this connection cite *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935) and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). Leaving aside the question whether these two cases have been overruled by subsequent holdings (see *Bowles* v. *Willingham*, 321 U. S. 503, 540 (1944); *United States* v. *Sharpnack*, 355 U. S. 286 (1958)), the cases have no bearing here. The preamble to the Interstate Commerce Act contains the general policy pursuant to which, as expressly stated therein, all provisions of the Act are to be administered and this is clearly a sufficient standard for the guidance of the Commission. As this Court said in *McLean Trucking Co.* v.

United States, 321 U. S. 67, 82 (1944), such general policy

> "is the Commission's guide to 'the public interest,' *cf. New York Central Securities Corp.* v. *United States,* 287 U. S. 12; *Texas* v. *United States,* 292 U. S. 522, * * *".*

Another argument made by the intervenors (pp. 29-31), but not by the State, is that the appellants were entitled to a trial *de novo* of their constitutional question in the District Court. The principal case upon which the intervenors rely is *Crowell* v. *Benson,* 285 U. S. 22 (1932). Davis, Administrative Law 918 (1951), states that the constitutional fact doctrine of that case is virtually dead, although not explicitly overruled. Also, the intervenors wholly misconceive the nature of the doctrine for otherwise they would not claim that it is applicable here. Under that doctrine, the Courts may retry constitutional facts without regard to the prior trial and determination thereof by the administrative agency. But the constitutional fact contention made here by the intervenors simply begs the question because it assumes that there are constitutional fact issues involved in this case which must be adjudicated by the Commis-

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* Various other provisions of the Act have repeatedly been upheld even though they set forth no specific standards (*e. g.,* § 4(1), the long and short haul clause, *Intermountain Rate Cases,* 234 U. S. 476, 486-9 (1914); and § 15(7) authorizing suspension by the Commission of proposed tariffs, *Carlsen* v. *United States,* 107 F. Supp. 398 (three-judge Court S. D. N. Y. 1952)). This Court has repeatedly sustained general standards like "public interest" (*United States* v. *Chemical Foundation,* 272 U. S. 1, 12-13 (1926)), or "inferior" quality *Buttfield* v. *Stranahan,* 192 U. S. 470, 496-7 (1904), or "fair and equitable" *Yakus* v. *United States,* 321 U. S. 414, 423-6 (1944), or "excessive profits" *Lichter* v. *United States,* 334 U. S. 742, 783-6 (1948).

sion and then may be retried by the Courts, and that is not the case. Once it is determined that Section 13a.(1) is constitutionally valid notwithstanding that it authorizes the Commission, without hearings or the adjudication of any facts, to refuse to interpose, there is no issue of fact to which the constitutional fact doctrine could possibly apply.

Another strange contention made by the intervenors (pp. 27-8), but not by the State, is that, comparing Section 13a.(1) with Section 13a.(2), the former is discriminatory. Their argument rests on the fact that Section 13a.(2), applying to operations solely within a State, provides that State jurisdiction shall be superseded only after hearings, while Section 13a.(1), involving solely operations from one State to another, does not require hearings unless the Commission orders them. However, there is no "equal protection of the laws" clause in the Fifth Amendment such as exists in the Fourteenth Amendment. Moreover, a contention that Congress may not constitutionally adopt one procedure for interstate operations and another procedure for intrastate operations is palpably without substance.

(*c*) **The appellants clearly have no standing to challenge the constitutionality of Section 13a.(1).** It is well settled that the public appellants (the State of New Jersey, its regulatory board and the local communities) may not on behalf of the citizens of the State attack the constitutionality of federal legislation.

Massachusetts v. *Mellon*, 262 U. S. 447, 485 (1923);
Florida v. *Mellon*, 273 U. S. 12, 18 (1927);

Georgia v. *Pennsylvania R. R.*, 324 U. S. 439, 446 (1945).*

Turning now to the users of the rail-ferry service, they are not entitled to attack the constitutionality of a federal statute unless they can show that they have a substantive legally protected interest; otherwise, such harm as they may suffer is *damnum absque injuria*. *Tileston* v. *Ullman*, 318 U. S. 44, 45-6 (1943); see *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700-701 (2d Cir. 1943): *cf. American Trucking Assns.* v. *United States*, 344 U. S. 298, 322-3 (1953).

But the users of the ferry service have no such legally protected interest as to entitle them to maintain an action to invalidate Section 13a.(1) and compel continuance of the losing ferry operations. They obviously have no legal right to insist that Congress shall not, in the exercise of the commerce power, restore the interstate railroads to an unregulated status, either in whole or in part. It is the function of Congress to decide such a policy question directly affecting interstate commerce and the ferry users may not appeal the question from Congress to the Courts. Their use of the deficit ferry service and their desire to have it continue is not a property interest protected by the Fifth Amendment, as is demonstrated

* Similar holdings are *Smith* v. *Indiana*, 191 U. S. 138, 149 (1903), where a State officer was held to have no standing to raise federal constitutional questions and *Jersey City* v. *United States*, 101 F. Supp. 702 (three-judge Court D. N. J. 1950), where the City of Jersey City was held to be without standing to challenge a Commission order granting an increase of railroad fares.

by holdings involving other users of rail service and persons in analogous positions.*

(d) **The grounds on which the minority opinion rests are on their face unsound.** The first ground of the dissent is that the general complaint provisions of the Interstate Commerce Act (Sections 13(1) and 13(2)) apply to Section 13a.(1) and require the Commission to hold hearings in all Section 13a.(1) cases, notwithstanding the contrary intention demonstrated in Section 13a.(1) itself. But, as already set forth herein, to require a hearing under Sections 13(1) and 13(2) or otherwise as a basis for the Commission's concluding not to interpose would emasculate Section 13a.(1). Section 13a.(1) is complete on its face and is therefore in no way affected by Sections 13(1) and 13(2). What the dissent seems to be saying in substance is that Section 13a.(1), in not requiring a hearing in all cases where complaints are filed thereunder, is inconsistent with Sections 13(1) and 13(2). However, Section 13a.(1) is much the later statute and it would control if there were any inconsistency between the two statutes and would repeal the earlier statute to the extent of the inconsistency.

Moreover, there is no inconsistency between the later and earlier statutes. Sections 13(1) and 13(2) apply only to complaints against a carrier for action done or omitted "in contravention of the provisions"

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* *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125, 129 (1940); *City of Atlanta* v. *Ickes*, 308 U. S. 517 (1939), *affirming* 26 F. Supp. 606 (three-judge Court D. D. C. 1939); *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 136-40 (1939); *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478-81 (1938); *Sprunt & Son* v. *United States*, 281 U. S. 249, 255 (1930); *Johnson* v. *Chesapeake & O. Ry.*, 188 F. 2d 458 (4th Cir. 1951) *cert. denied*, 342 U. S. 833 (1951); *Woodruff* v. *United States*, 40 F. Supp. 949 (three-judge Court D. Conn. 1941).

of the Act. No one has pointed to any provision of the Act which would be violated by the Railroad's discontinuance of these ferries.* Certainly, action which a carrier proposes to take in exact accordance with the provisions of Section 13a.(1) cannot possibly *contravene* any provision of the Act.

The second ground of the dissent (and the leading argument made by the intervenors in this Court) is that the notice filed under Section 13a.(1) was defective because it gave notice of discontinuance of "all" the Railroad's trans-Hudson ferries. The statute states that the operation, in whole or in part, of "any" train or ferry in interstate commerce is subject thereto; and the dissent (and the intervenors) contend that under this provision of the statute there should have been five separate notices (one for each of the five ferries which the Railroad is operating) instead of a single notice covering the operation of all five ferries. Why the statute should be so construed is not apparent. The object of a notice is to convey information, and obviously more information was conveyed by referring to discontinuance of "all" the ferries than by referring to each of five different ferries by name or number and thereby leave it open to question whether these were "all" the ferries. Moreover, a complete answer to the contention is the fact that the statutory Rules of Construction (1 U.S.C. § 1) provide in substance that, in construing a federal statute (unless the context indicates other-

* The appellants themselves obtained the prior District Court decision that neither the abandonment provisions of the Interstate Commerce Act (Sections 1(18)-(20)) nor any other provisions of the Act cover discontinuance of the Railroad's interstate ferry service.

wise), words importing the singular shall include the plural and words importing the plural shall include the singular. The majority did not consider this point worthy of mention in its opinion and the State and its regulatory body do not even refer to it.

Finally, under the heading "Is Section 13a(1) unconstitutional?", the dissent does not set forth any reason why the statute is invalid, but argues only that Section 13a.(1) is unjust. The dissent says "that the public was ignored in the formulation of the amendment 13a(1)" and that the dissenter has "therefore grave misgivings about the justice of the statute for the Fifth Amendment also protects states and their subdivisions and their citizens". The dissent thereby takes the view that local interests should in justice take priority over the national public interest as determined by Congress. However, in thus inveighing against the wisdom of Section 13a.(1), the dissent presents no constitutional question. Plainly, the wisdom of Section 13a.(1) is, under our Constitution, a matter for Congress and not for the Courts.* There is no substance to the theory of the dissenting opinion that litigants who are displeased with federal legislation may resort to the federal Courts for review

* Nor do the intervenors present any question appropriate for this Court when, in the following statement, they ask it carefully to scrutinize the action of Congress in enacting Section 13a.(1 (p. 22):

> "There seems to exist little doubt but that with Section 13a(1) Congress did indeed intend to pre-empt the field thereby ousting state jurisdiction. However, it is submitted that in such a situation the action of Congress must be carefully scrutinized."

of the wisdom of Congress in enacting statutes which are within the limits of its constitutional power.*

Conclusion

No substantial question either of constitutionality or statutory construction is presented by these appeals and the judgment below should therefore be affirmed.

Alternative Motion to Advance

If the Court does not grant this motion to affirm, the Railroad respectfully requests that the Court accelerate the progress of these appeals so that they may be heard and decided during this term. The District Court on December 4, 1958, in granting a stay without bond, required that the notice of appeal, record and jurisdictional statement be filed in this Court by January 2, 1959; and, in arguing below for the stay, counsel for the intervenors said to the District Court that they "would not let a day go by that we [they] could help in trying to get this matter before the Supreme Court."

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* The writer of the dissenting opinion below was the author of the opinion rendered by the District Court in the Section 1(18) case and in that opinion he recognized that Congress could "in its wisdom" grant the requisite authority, saying (158 F. Supp., at p. 103):

> "The Congress may in its wisdom decide to grant the requisite authority, though as yet there is no intimation of this from the legislative history, but until that time, the Commission, strictly a creature of its creating statute, is without the power to permit the discontinuance of this partial service."

Thereafter, and exactly in accord with such statement, Congress by Section 13a.(1) supplied directly to the Railroad the authority which the dissenter found to be missing in the earlier case.

This alternative relief is sought so that the Railroad may as soon as possible be relieved of the burden of its out-of-pocket ferry losses which continue at the rate of over $1,200,000 per annum; early relief from losses like these was the plain intention of Congress when it enacted the emergency provisions of Section 13a.(1).

Respectfully submitted,

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Dated: January 12, 1959.

APPENDIX I

Section 5 of the Transportation Act of 1958 (P. L. 85–625)

"Sec. 5. The Interstate Commerce Act, as amended, is amended by inserting after section 13 thereof a new section 13a as follows:

'DISCONTINUANCE OR CHANGE OF CERTAIN OPERATIONS OR SERVICES

'Sec. 13a. (1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision

or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such

discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

'(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this part, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service or such train or ferry without discontinuance or change, in whole or in part,

will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.' "

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Nos. 621 and 622

In the Supreme Court of the United States

OCTOBER TERM, 1958

STATE OF NEW JERSEY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

COUNTY OF BERGEN, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 621

STATE OF NEW JERSEY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 622

COUNTY OF BERGEN, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals by the State of New Jersey and the Board of Public Utility Commissioners of

the State of New Jersey (No. 621), and by a group of communities and a commuters' association (No. 622) from the judgment of a three-judge district court dismissing their complaints. The complaints sought relief on alternative theories: (1) invoking the jurisdiction of the district court under 28 U.S.C. 1331 and 2282, appellants sought to enjoin New York Central from discontinuing its railroad passenger ferry service between Weehawken, New Jersey, and New York City, pursuant to Section 13a(1) of the Interstate Commerce Act, on the ground that this section is unconstitutional; (2) invoking the jurisdiction of the district court under 28 U.S.C. 1336 and 2325 to review orders of the Interstate Commerce Commission, appellants asked the court to direct the Commission to institute an investigation into the proposed discontinuance of ferry service. On September 12, 1958, the court granted a preliminary injunction restraining the New York Central from discontinuing the service.

On November 3, 1958, the three-judge court, with Judge McLaughlin dissenting, rendered its opinion holding that Section 13a(1), both on its face and as it had been applied, is a valid exercise of the commerce power of Congress, and that the court was without power to require the Commission to institute an investigation pursuant to Section 13a(1). The court, however, continued in effect, pending appeal to this Court, the injunction against discontinuance of the ferry service.

The prior administrative and judicial proceedings under Section 1(18) of the Interstate Commerce Act. New York Central's trans-Hudson ferries here involved are the same railroad passenger ferries as were

involved in *New York Central Railroad Company Ferry Abandonment,* 295 I.C.C. 385 and 519. In that proceeding, after extensive hearings, the Interstate Commerce Commission authorized the carrier to discontinue these passenger ferries on the theory that the passenger ferries, operating on different routes than New York Central's trans-Hudson freight services which were to continue in operation, constituted a separate and distinct line of railroad subject to abandonment with the Commission's authorization pursuant to Section 1(18). In a suit brought by the present appellants, the court below held that the discontinuance of the passenger ferry service would not constitute an abandonment of a line of railroad subject to the Commission's jurisdiction under Section 1(18), but only a partial discontinuance of service over which the Commission admittedly then had no jurisdiction. *Board of Public Utility Commissioners* v. *United States,* 158 F. Supp. 98. The judgment in that case was appealed to this Court which, on June 16, 1958, noted probable jurisdiction. 357 U.S. 917. There is pending in that case (No. 41, this Term) a motion to defer further proceedings until these appeals have been decided.

The administrative and judicial proceedings in this case. On August 12, 1958, the Transportation Act of 1958 became effective. Section 5 of that Act added to the Interstate Commerce Act a new Section 13a giving for the first time to the Interstate Commerce Commission jurisdiction with respect to discontinuance or change in the operation of trains and ferries (as distinguished from the total abandonment of a line of railroad), both interstate (subsection (1)) and intrastate (subsection (2)). Section 13a(1) pro-

vides that if the rights of a railroad subject to Part I of the Act with respect to the discontinuance or change of the operation or service of any interstate train or ferry are subject to State law or regulation, the railroad may file with the Commission, mail to the Governor of each State in which the train or ferry is operated, and post in every station served thereby, a notice at least 30 days in advance of the proposed discontinuance or change. Upon the filing of the notice, the Commission may within 30 days institute an investigation of the proposed discontinuance or change; the Commission may also, if it decides to investigate, within 20 days require continuance of the service pending its investigation, but not for longer than four months. If, after hearing in such investigation, the Commission finds that the operations proposed to be discontinued are required by public convenience and necessity and will not unduly burden interstate or foreign commerce, it may order their continuance or resumption for a period of not more than one year. However, if the Commission takes no action, the railroad may discontinue or change the service in accordance with the notice.

On August 13, 1958, the New York Central filed, mailed, and posted a notice that on September 13 it would discontinue the operation of its passenger ferries across the Hudson River between New Jersey and New York City. Thereafter, the appellants filed with the Commission separate complaints objecting to the proposed discontinuance of ferry service and requesting the Commission to institute an investigation and to require continuance of the service pending

such investigation. On August 26, 1958, the Commission released a notice stating:

> The Commission, upon consideration of the matters involved, including consideration of the records in Finance Docket No. 18781 (*New York Central R. Co. Ferry Abandonment,* 295 I.C.C. 385 and 519) and Docket No. 32359 (*Fares and Charges via Weehawken Ferry*), has concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued, in whole or in part.

On September 2, 1958, the Commission issued an order instituting an investigation with respect to New York Central's proposed discontinuance of ferry service "solely to determine the conditions, if any, which should be imposed for the protection of employees affected thereby," and denied reconsideration of its prior ruling in all other respects. The present actions were commenced by the appellants in the court below on September 4, 1958.[1]

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[1] The various proceedings with respect to New York Central's trans-Hudson ferries were paralleled by similar proceedings with respect to the Erie Railroad's passenger ferry between Jersey City and New York City. Thus, the Commission's order in *Erie Railroad Company Ferry Abandonment*, 295 I.C.C. 549 and 599, authorizing abandonment of Erie's ferry pursuant to Section 1(18), was set aside by the three-judge court below in *Board of Public Utility Commissioners* v. *United States*, 158 F. Supp. 104. This Court noted probable jurisdiction in Erie's appeal from that judgment on June 16, 1958. 357 U.S. 917. Similarly, on August 14, 1958, Erie also filed a notice for proposed discontinuance of this same ferry pursuant to Section 13a(1), and the Commission determined not to institute an investigation. The appellants in No. 621 made the same challenge to Erie's discontinuance of its pas-

ARGUMENT

The Transportation Act of 1958 was the result of extensive hearings in 1957 and 1958 by subcommittees of the Senate and House Committees on Interstate and Foreign Commerce. By 1958 the railroads had lost most of their passenger business (both inter-city and commuter) to other forms of transportation. The committee reports on the Act pointed out that the railroads were in a "poor financial position" due in large measure to "the general passenger deficit" (S. Rep. No. 1647, 85th Cong., 2d Session., pp. 8, 9); that a major cause of this precarious condition was the serious problem of "difficulty and delay" in discontinuing or changing uneconomical passenger services which "constitutes a heavy burden on interstate commerce" (*id.* p. 21); and "that State regulatory bodies all too often have been excessively conservative and unduly repressive in requiring the maintenance of uneconomic and unnecessary services and facilities" (*id.* p. 22).

To deal with this situation, Congress in Section 13a(1) adopted a summary procedure for discontinuance of uneconomical interstate train and ferry services. No prior Commission approval for such

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senger ferry service as they made in the instant case with respect to the New York Central ferry service. However, in dismissing the present appellants' complaints in the *Erie* case the court below refused to continue pending appeal the preliminary injunction which it had previously granted against Erie's discontinuance of ferry service. As a result, Erie has discontinued its passenger ferry service. Accordingly, unless the appellants perfect an appeal in the subsequent *Erie* case it would appear that both that case and the pending prior appeal will become moot.

discontinuance is required: discontinuance is left to the discretion of carrier management, which is required only to give 30 days notice thereof; and the Commission is given only a limited and temporary veto power. See *supra*, pp. 3–4. This expedited procedure stands in sharp contrast to the provisions in Section 13a(2) governing the discontinuance or change of the operations of intrastate trains or ferries. Intrastate operations may be discontinued only pursuant to specific "authority" granted by the Commission after "full hearing" and upon finding (1) that public convenience and necessity permits such discontinuance or change and (2) that continued operation of the trains or ferries would unduly burden interstate commerce.

1. The court below correctly held that appellants had no statutory right to a hearing before the ferry service was discontinued. Section 13a(1) does not require that a hearing be held upon the complaint of any State or users before an interstate train or ferry service is discontinued or changed. Rather, Congress provided that "the Commission *shall have authority* * * *, either upon complaint or upon its own initiative without complaint, to enter upon an investigation," and that "Upon the institution of such investigation, the Commission, * * * *may require*" continuance of the service pending the investigation (but not for longer than four months). (Emphasis added.) Upon its face, as the court below held, Section 13a(1) empowers, but does not require, the Commission in its discretion to investigate.

Appellants urge that the phrase "shall have authority" to investigate must be equated with the Commission's obligations to investigate rate complaints under Section 15(7), which also uses the words "shall have authority". The court below contrasted the interests involved in the lawfulness of carrier rates with those involved in a discontinuance of service, and concluded (J. St. 59) [2] that

> Section 13a(1) embodies a new and distinct exercise of the congressional power. Its language is clear and unambiguous and therefore neither admits of nor requires any construction by comparison with any other section or subsection of the Interstate Commerce Act, as amended.

In so holding, the court below correctly recognized that to import into Section 13a(1) the hearing requirements of other provisions of the Act would destroy the expeditious procedure which Congress specifically provided to deal with this urgent problem.

Appellants further seek to rewrite the special procedures of Section 13a(1) into an application and prior hearing procedure (as in Sections 1(18) and 13a(2)) by urging that the general complaint and investigation provisions of Section 13(1) and (2) should be read into Section 13a(1) so as to require, whenever demanded by a State or user, a hearing *prior* to a service discontinuance. Again, giving effect to the clear and urgent purpose of Congress, the court below held: "The patent difference between the situa-

[2] We use the abbreviation "J. St." to refer to the jurisdictional statement in No. 621, and the abbreviation "J. St. (622)" to refer to the jurisdictional statement in No. 622.

tions and procedures contemplated and prescribed in old Section 13 and new Section 13a(1) eliminates any ground for a similarity of treatment" (J. St. 47–48).

2. There is no merit to appellants' contention that Section 13a(1) violates the due process clause of the Fifth Amendment if it is construed as authorizing the discontinuance of an interstate train or ferry service without requiring a prior hearing before the Commission upon the demand of a State or of users of the service.

The power of Congress to provide for exclusive Federal regulation of the discontinuance of interstate train and ferry service was settled by *Colorado* v. *United States,* 271 U.S. 153, and is conceded by the appellants (J. St. 14–16). See also *New York Central R. Co.* v. *Hudson County,* 227 U.S. 248.

Similarly, the power of Congress to determine that in the absence of affirmative Federal action some aspect of interstate transportation shall be left to the managerial judgment of the carriers, is beyond dispute. Thus, state action is precluded "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute". *Bethlehem Steel Co.* v. *N.Y. State Labor Relations Board,* 330 U.S. 767, 774; *Chicago* v. *Atchison, T. & S.F. Ry. Co.,* 357 U.S. 77. See, generally, *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769–770. Stated otherwise, Congress is empowered to alter in the light of changing conditions the common law and statutory service obligations of interstate railroads. *Adams Express Co.*

v. *Croninger,* 226 U.S. 491; *Colorado* v. *United States, supra.*

We believe it is obvious that Congress could have provided that the discontinuance of interstate trains or ferries shall rest solely in the railroads' managerial discretion, and that in such case no hearing prior to discontinuance would be required. We are aware of no principle of law, nor have appellants cited any, which prohibits Congress from empowering the Commission, in the public interest, to determine without a hearing whether to investigate the proposed discontinuance or to allow it to take effect. Where Congress has thus placed the decision to act or not to act solely in the discretion of an administrative body, there is no constitutional right to a hearing. *Jay* v. *Boyd,* 351 U.S. 345, 352–356.

Clearly, the appellant State and Board have no interest protected by the due process clause of the Fifth Amendment. Even assuming that, absent Federal legislation, the State could require continuance of wholly interstate ferry service between New Jersey and New York, that power, as the Court below held (J. St. 42–45), could not survive the valid exercise of Federal power in Section 13a(1). The State's suggestion that it has such rights and duties in the protection of the public as entitles it to a continuation of the service regardless of the burden upon the railroad or upon interstate commerce (*id.,* 19) is without merit. *Colorado* v. *United States, supra,* 271 U.S. 153, 163, 165–166. Nor is its position better if regarded as the representative of its citizens. *Massachusetts* v. *Mellon,* 262 U.S. 447.

Appellants' suggestion that the State has rights, derived from the railroads' State franchises, to a continuation of the ferry service which entitles it to a hearing (J. St. 20) was correctly rejected by the court below, which held that Section 13a(1) "extinguishes * * * any other public rights which may have resulted from the initial grants of ferry franchises and the acceptance and user thereof by the defendant railroad and its predecessors" (*id.*, 54). This Court has repeatedly held that the obligations of interstate railroads under State charters are superseded by the exercise by Congress of its power to regulate commerce. *Colorado* v. *United States,* 271 U.S. 153, 165–166; *New York* v. *United States,* 257 U.S. 591, 600–601; *Texas* v. *United States,* 292 U.S. 522, 530–531.

Finally, the appellant State urges (J. St. 20): "The users of the service have common law rights in the service as third party beneficiaries of the franchise contracts." The court below correctly held that any such rights of the users of the service terminated with the rights of the State (J. St. 54). Even if each user of the ferry service had a personal contract with the railroad for its continuance, such contract rights would have been extinguished when Congress enacted Section 13a(1). *Louisville & Nashville R.R.* v. *Mottley,* 219 U.S. 467. Also, as the court below recognized, users of train or ferry service have no common law right to continuance of the service at a loss. *Bullock* v. *Railroad Commission of*

Florida, 254 U.S. 513, 520–521; *Lucking* v. *Detroit & Cleveland Navigation Co.*, 265 U.S. 346, 350–352.[3]

3. The court below correctly held that the Commission's determination not to investigate the railroad's proposed discontinuance of the ferry service is not subject to judicial review.

a. The court below properly ruled that there was before it no "order" of the Commission within the meaning of 28 U.S.C. 1336, which confers jurisdiction to "enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." As the court noted, the Commission's notice of August 26, 1958 "was nothing other than an announcement that the Commission intended to take no action with respect to the railroad's notice of intention to discontinue the ferries" (J. St. 38). Under the statute, the Commission does not "authorize" discontinuance of the ferry service; its notice, therefore, was simply to inform the public that it had decided not to investigate. The Commission's order of September 2, 1958, merely instituted a limited investigation under Section 13a(1) "solely to determine the conditions, if any, which should be

[3] The intervening appellants, but not the appellant State and Board, contend that Section 13a(1) constitutes an invalid delegation of legislative power "in that no legislative standard is provided to guide the Interstate Commerce Commission in its determination not to hold an investigation" (J. St. (622), 23 ff.). But in determining whether to investigate, the Commission obviously is to be guided by the same standards which govern its decision whether (if it does investigate) to direct restoration or continuance of the service—"public convenience and necessity," and "undue burden on interstate commerce," applied in the light of the National Transportation Policy. Appellants concede (*id.*, 25) that these standards are adequate.

imposed for the protection of employees affected thereby," and denied rehearing of its prior ruling. Neither of these documents required or prohibited action by any person within the meaning of *United States* v. *Los Angeles & S.L. R.R. Co.*, 273 U.S. 299, 310, or foreshadowed enforcement proceedings as in *Frozen Food Express* v. *United States*, 351 U.S. 40.

b. The relief sought by appellants (assuming the constitutionality of Section 13a(1)) was that the district court direct the Commission to institute an investigation respecting discontinuance of the ferry service. However, the court found that "the statute under review expressly commits to the discretion of the Commission the determination of whether or not it will investigate any complaint which is evoked by a carrier's notice of intention to discontinue" (J. St. 39). Accordingly, it held that the case is within the exception to the judicial review provisions of Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) covering "agency action [which] is by law committed to agency discretion." We submit that this ruling is plainly correct. The Commission's decision not to institute an investigation into the proposed discontinuance of ferry service is no less committed to agency discretion than the determination by the Panama Canal Co. not to institute a proceeding for readjustment of the tolls of the Panama Canal. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317.

c. If the Commission's decision not to institute an investigation were subject to judicial review, appellants would have to show an abuse of discretion. They have not done so. In its notice of August 26, 1958, the Commission stated that its determination

not to investigate took into account the records in the prior New York Central ferry abandonment case, and in the pending proceedings involving fares and charges for the Weehawken ferry (Docket No. 32359). Thus, the Commission's decision was made with the benefit of an evidentiary record containing the pertinent facts with respect to the ferries proposed to be discontinued.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court is so clearly correct that it should be affirmed without further briefs or oral argument.

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JANUARY 1959.

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[4] The intervening appellants further contend (J. St. (622) 12–14) that New York Central violated the notice provisions of Section 13a(1) by filing a single notice of the proposed discontinuance of its Weehawken passenger ferry service, instead of a separate notice for each vessel used in that service. But there is nothing in Section 13a(1) which requires that a separate notice be filed for each boat. The purpose of the notice provision is to inform the interested agencies and members of the public. The notice here filed adequately served that function; separate notices would more likely have tended to confuse than to inform. Moreover, New York Central's notice was filed on August 13, 1958, while the Commission's notice regulations, relied on by intervening appellants, were not published in the Federal Register until August 20, and did not become effective until August 29.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 622

COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD AND THE TOWNSHIP OF TEANECK; AND CITIZENS UNITED TRANSIT COMMITTEE, *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

FOREWORD

This brief is filed in opposition to the motion of The New York Central Railroad Company, hereinafter sometimes called the Railroad, and to the motion of the United States of America and of the Interstate

Commerce Commission, hereinafter sometimes collectively called the Commission, appellees herein, which seek to affirm the final judgment and decree entered on December 4, 1958 by a statutorily constituted United States District Court of three judges, District of New Jersey, from which final judgment and decree this appeal has been taken.

Appellants herein were plaintiff-intervenors below; plaintiffs below, State of New Jersey and Board of Public Utility Commissioners of the State of New Jersey, likewise, have taken an appeal from the aforesaid final judgment and decree (No. 621, this Term). Appropriate motions will be filed as soon as permissible to consolidate these two appeals, together with the appeal of the Railroad in No. 41, October Term, 1958 (No. 838, October Term, 1957) wherein this Court noted probable jurisdiction on June 16, 1958. *New York Central R. Co.* v. *Bd. of Public Utility Com'rs., et al.*, 357 U.S. 917.

Appellants' Statement as to Jurisdiction filed herein sets forth the basis of this Court's jurisdiction to entertain this appeal, the statement of the case and a statement of the questions presented by this appeal. In addition, it refers to the opinion of the District Court which is set forth in full together with the dissenting opinion of Circuit Judge McLaughlin as Appendix A thereto; the "Notice" and "Order" of the Interstate Commerce Commission as Appendices B and C respectively; and applicable provisions of the Interstate Commerce Act, as amended, as Appendix E.

Appellants contend that the questions presented by this appeal are substantial and of particular importance to the public including appellee railroad and

appellants and, accordingly, merit full consideration and determination by this Court upon written briefs and oral argument after which the judgment of the District Court should be reversed and the injunction heretofore issued made permanent.

ARGUMENT

During the closing days of the 85th Congress, Second Session, there was enacted the Transportation Act of 1958, which, although excellent in many respects, does, nevertheless, reflect the haste and disorder which attended its passage. Section 5 thereof (Section 13a, 49 U.S.C.), particularly, is a product of the last minute rush in conference committee and the confusion which characterized the closing days of that Congress. Amidst this disorder, no doubt, could be found railroad representatives anxiously plying their trade but, as was recognized by the dissenting circuit judge of the 3-judge District Court herein, ". . . and one thing is certain, namely, that the public was ignored in the formulation of the amendment 13a(1)." (JS 28a).

Under such tedious circumstances it is not unusual to find legislation wanting in certain constitutional essentials or, at the very least, in need of intelligent and just judicial construction to remove from it the stain of ambiguity and uncertainty. Such, perhaps, is the quality of new Section 13a(1) of the Interstate Commerce Act, 49 U.S.C.A., which the government in its motion (p. 3) concedes gives jurisdiction for the first time to the Interstate Commerce Commission with respect to the quantity of service, discontinuance or change in the operation or service of less than a total line of railroad. The jurisdiction thus delegated by Section 13a(1), by the express terms of the Act, ex-

tends only to the operation or service of any interstate train or ferry *subject to State law or regulation* (JS 36a). Thus, the intent of Congress was not to create regulation where before none had existed. To the contrary, this legislation, Section 13a(1), is addressed only to railroad service operating between those States which have undertaken to regulate the quantum of such service.

By Section 13a(1) the Congress did not undertake to oust from jurisdiction the State and local authorities and thus impose a dominate federal authority. To the contrary, the section clearly recognizes and fosters a continuing local authority which is subject only to temporary suspension and, then, only after the railroad has complied with certain statutory provisions of Section 13a(1) as to the giving of notice. At this point the jurisdiction of the Commission, thus invoked, becomes alive and upon the notice thus filed by the railroad the Commission must determine in the first instance whether public convenience and necessity and undue burden on interstate commerce warrant an investigation into the proposed discontinuance of service.

Such an investigation may stem from the Commission's own initiative; or it may result from one or more complaints filed with the Commission under its general complaint procedure of Section 13 of which Section 13a is but an enlargement. Indeed, Section 13a(1) contains within itself provision for the making of complaints to the Commission. The Commission, in determining whether to institute an investigation into a proposed discontinuance as prayed for in such a complaint, tests the sufficient of the allegations of the complaint. If the complaint contains allegations suffi-

cient to place in doubt the propriety of the proposed discontinuance in light of public convenience and necessity and considerations of interstate commerce, then the Commission must institute an investigation. Its refusal so to do is judicially reviewable, because such a refusal is a final exercise by the Commission of its *quasi judicial* function of determining controversies.

Of course, without an oral hearing with opportunity for cross-examination, the Commission has no way of knowing whether the allegations of complainants are true; nor, indeed, has it any way of knowing whether the allegations of the railroad are true. When the issues are raised, as they were in the instant case, the Commission has no alternative other than to proceed to resolve the issues. The determination thereof by the Commission after investigation and hearing, of course, is judicially reviewable, and to this appellees raise no dispute. Rather does the present dispute relate to the reviewability of an order of the Commission *not* to investigate complaints which on their face contain allegations which, if found to be true, would justify the Commission in denying the Railroad's proposal to discontinue service.

The effect of the Commission's refusal in the instant case to institute an investigation is the same as though the Commission, after investigation, had found the proposed discontinuance justified by considerations of public convenience and necessity and of interstate commerce. The issues raised by appellants before the Commission were determined with the same finality and adjudication. Certainly appellants and others may test the sufficiency of the Commission's decision in such a situation in a court of law as surely as they

might had they suffered an adverse decision after investigation and hearing.

1. Appellees urge that appellants had no right to a hearing or to offer evidence on the question of whether the Commission should institute an investigation. But the Commission may not ignore and reject factual allegations as untrue without affording appellants an opportunity to prove their allegations. In similar fashion, a court of law may not dismiss a complaint which states a valid cause of action.

The Commission by a footnote on page 12 of its motion[1] to affirm readily concedes that in arriving at its decision whether to institute an investigation pursuant to Section 13a(1) it is bound by the same legislative standards, "public convenience and necessity" and "undue burden on interstate commerce" as would control its decision after an investigation. Of course, with this appellants readily agree. But appellants go one step further and assert that just as a decision of the Commission on "public convenience and necessity" and "undue burden on interstate commerce",

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[1] This footnote 3 on page 12 of the Commission's Motion reads as follows:

> "[3] The intervening appellants, but not the appellant State and Board, contend that Section 13a(1) constitutes an invalid delegation of legislative power 'in that no legislative standard is provided to guide the Interstate Commerce Commission in its determination not to hold an investigation' (J. St. (622), 23 ff.). But in determining whether to investigate, the Commission obviously is to be guided by the same standards which govern its decision whether (if it does investigate) to direct restoration or continuance of the service—'public convenience and necessity,' and 'undue burden on interstate commerce,' applied in the light of the National Transportation Policy. Appellants concede (id., 25) that these standards are adequate."

after full investigation, must be based on substantial evidence and those other considerations contemplated by the Administrative Procedures Act, so, too, must its determination of these two ultimate issues, "public convenience and necessity" and "undue burden" meet the same requirements when the Commission is deciding whether or not to investigate.

Appellees further argue that the complaint provisions of Section 13(1) and (2) are not to be construed as part of Section 13a(1). So to argue is to ignore the fact that the provisions of Section 13a(1) were made a part of existing Section 13 for the very purpose of making available to appellants and others the well understood and existing complaint procedures of Section 13.

Section 13(1) and (2) provide for complaints by appellants and others as a means of obtaining satisfaction for anything done or omitted to be done by any common carrier subject to the provisions of the Act in contravention of the provisions thereof. Appellants and others filed such complaints alleging the Railroad to have violated the very section pursuant to which the Railroad purported to act—Section 13a(1).

Section 13a(1) did not repeal the existing provisions of Section 13(1) and (2). On the contrary, it enlarged upon the several grievances for which satisfaction is available.

2. In their motions to affirm appellees argue there exists no substantial issue relative to the constitutionality of Section 13a(1). In this regard, particularly the Commission speaks of the various powers of the Congress and finds them suffiicent to permit the construction it claims for Section 13a(1). But the

case does not involve hypotheticals. Appellants concern is with what the Congress actually has attempted to do through the enactment of Section 13a(1).

Appellants argument on the constitutionality of Section 13a(1) is in the alternative, in the event that it be found to be susceptible to an interpretation and construction falling within constitutional requirement. The majority of the District Court, however, on the argument of appellees, has construed Section 13a(1) in a manner abrogating and deleting the necessary legislative standards from that section. As conceded by the government and the Commission, the standards of "public convenience and necessity" and "undue burden on interstate commerce" must guide the Commission in its determination whether to investigate. At this advanced stage of federal administrative law it is almost trite to say that the determination of these ultimate facts must be based on substantial evidence the absence of which would render the Commission's decision unlawful and subject to injunction.

The effect of the holding of the majority of the District Court is to permit the Commission to base its determination on something other than substantial evidence and to open the door to arbitrary and capricious action, to abuse of discretion and to do all of those things which the Administrative Procedures Act was designed expressly to prevent.

Appellants also allege Section 13a(1), as construed to deprive them of constitutional due process under the 5th Amendment. Appellees while not denying the truth of the allegation, nevertheless, argue that appellants have no standing to raise this charge. But in

this appellees are being unfair. Having obtained a favorable ruling from a majority of the District Court denying appellants offer to prove their standing, appellees ought not now to be permitted to argue that appellants have no legally protected interest sufficient to permit them to invoke the due process clause of the 5th Amendment.

The District Court's denial of appellants offer of proof of their basic property and contractual interest is an issue on this appeal. It is curious to note that appellees have ignored this question in their respective motions to affirm.

At present, there are before the Commission an excess of twenty Section 13a applications similiar to the instant case. The muddle in which the Commission finds itself in construing and applying the powers delegated to it by Section 13a must be resolved before its just and equitable administration is possible. For example, in *Great Northern Ry. Co.—Discontinuance of Service,* I.C.C. Finance Docket No. 20348, decided February 6, 1959, the majority of the Commission apparently adopts the view that it must determine "public convenience and necessity" and "undue burden on interstate commerce" whether it requires continuation of the service or not. This, of course, is the view advanced by appellants herein. But the dissent in that decision advances the view of appellees herein to the effect that "public convenience and necessity" and "undue burden on interstate commerce" need be found only when the service is to be continued. This is the view advanced herein by appellees. The error is clear. The requirements of "public convenience and necessity" and considerations of interstate commerce should

dictate whether the service is to continue or terminate, and not the reverse. To say that these two ultimate findings are to be made only after the decision to discontinue or continue the service has been made is to ignore the very legislative standards which the Congress has laid down to control the Commission's action. Congress did not delegate to the railroad authority to expel local jurisdiction, but rather gave to the railroad an election of agencies, either local or federal, to which it might look for regulation.

3. Perhaps the major issue on this appeal relates to the judicially reviewable character of the order of the Commission wherein, among other things, it declined to investigate the proposed discontinuance.

a. The Commission argues by its motion (page 12-13) that the order of the Commission is not reviewable because it neither ". . . required or prohibited action by any person within the meaning of *United States* v. *Los Angeles & S.L. R.R. Co.*, 273 U.S. 299, 310, or foreshadowed enforcement proceedings as in *Frozen Food Express* v. *United States*, 351 U.S. 40." But to make the argument is to answer it, for, as has been stated already, the Commission's action clearly was an exercise of its *quasi judicial* function of determining the controversy which existed between the railroad and appellants. Even the railroad fully appreciates the severity of the contest on the issue before the Commission (page 10 of Railroad's motion).

To an extent even greater than in *Frozen Foods Express*, supra, the situation here is different from a mere investigation by the Commission such as its investigation in *Railroad Passenger Train Deficit*, I.C.C. Docket No. 31954 (1958) where the Commission under-

took on its own initiative ". . . a fact-finding survey pursuant to the duty of the Commission specified in section 12(1) to 'keep itself informed as to the manner and method in which the same [business of all common carriers subject to the provisions of this part] is conducted.' "

In the instant proceeding the rights and claims of appellants were adjudicated and disposed of finally by the summary action of the Commission.

b. Appellees also urge this Court's holding in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), as controlling on appellants' right to judicial review pursuant to Section 1009(*e*) of the Administrative Procedures Act, Title 5, U.S.C.A.

Certainly Section 1009 recognizes the power of Congress by law to commit certain areas of agency action to the unreviewable discretion of one of its agencies. But to adopt the argument thus advanced would be tantamount to holding that even after an investigation, the Commission's action would not be reviewable. No one contends this to be consistent with the law. Why is not the Commission's action in the instant case as reviewable as it would be after a hearing is had and evidence introduced? The same rights and interests are adjudicated and concluded on the same allegations. The only difference is that the decision after hearing would be based on substantial evidence, whereas in the instant case it clearly was not.

The principal contention of appellees on this point is that the brief time limitations imposed upon the Commission by Section 13a(1) manifest a Congressional intent to withhold judicial review (Railroad's Motion, p. 10; Commission's motion, p. 8).

That Section 13a(1) was enacted by the Congress to afford railroads some uniformity of regulation and a measure of prompt regulatory action over the quantum of their service is not disputed here by appellants. Certainly, in placing statutory time limitations upon the Commission the Congress mandated prompt action. But to recognize this time limitation as short and perhaps unrealistic in light of the Commission's prior practice, through no stretch of juristic debate denotes an intent by the Congress to abrogate and ignore the rights and demands of the public as recognized by the Congress. Rather do these time limitations, expressed in the statute, prescribe for the Commission an order of business with Section 13a(1) proceedings, perhaps from usual regulatory lag, receiving primary consideration. Appellees would confuse the need for prompt determination as a license for no determination.

To the contrary, the greater there exists the opportunity for rash and reckless action, the greater the need for judicial restraint. The Urgent Deficiencies Act contains provision within itself and the Administrative Procedures Act was expressly enacted to afford that judicial review so needful in the instant case.

The majority of the District Court adopted the argument of the railroad to the effect that Section 13a(1) does not require action by the Commission, and, therefore, there exists no action to be reviewed by the court. In reply appellants submit that in the instant proceeding the Commission, nevertheless, did act and that action is reviewable. But the fallacy of the rational of the majority below in this respect is made more obvious by its suggestion that the proper course

for appellants to have followed is a suit in mandamus. If the Commission had failed to act in the instant proceeding, then mandamus may have been the appropriate remedy. But for the majority of the District Court, on the one hand, to conclude that the Commission did not have to act, and, on the other hand, to conclude the appropriate remedy available to appellants to be mandamus compelling action, merely compounds the contradiction under which the railroad and the court below labor.

In serving notice on the public and filing with the Commission, appellee railroad failed to comply with the requirements of Section 13a(1). In arriving at its determination upon the notice so filed, the Commission, likewise, failed to comply with the statute. And by ignoring the numerous complaints and protests filed with it by appellants and others, the Commission further acted contrary to its statutory authority. These are serious allegations deserving careful presentation and thoughtful judicial determination. They ought not to be disposed of in such summary fashion as appellees now seek by their motions to affirm.

c. The final argument advanced by appellees assumes the action of the Commission to be reviewable under Section 1009, Title 5, U.S.C.A., and proceeds on the theory that the records developed before the Commission in two prior cases support its decision not to investigate the instant complaints (Commission's motion, p. 13).

The first of these two records, *New York Central Ferry Abandonment*, 295 I.C.C. 385, 519, was made almost four years ago and includes none of the very

substantial reduction in ferry service and costs subsequently permitted the Railroad, nor any other alleged very substantial change in circumstance. Affirmative proof was offered by appellants of these facts, but was largely rejected by the majority of the court below. But the principal objection to the use of this record is that, although it addressed itself to the question of public convenience and necessity, one of the two standards controlling the Commission in the instant case, its findings thereon were not supported by substantial evidence when originally made several years ago. The passage of time has not served to correct this error. Indeed, the same 3-judge District Court which ruled in the instant case, previously expressed itself, unanimously, to the effect that the record was wanting in substantial evidence to support the Commission's conclusion. *Board of Public Utility Commissioners, et al.* v. *The New York Central Railroad* (D.C. N.J. 1957) 158 F. Supp. 98. The Railroad has challenged this ruling by its appeal to this Court (No. 41 this Term).

The second record is one developed in support of an application for an increase in fares and charges for the Weehawken ferry and addresses itself to the reasonableness of the proposed rates. Evidence on the question of "public convenience and necessity" and "undue burden on interstate commerce" was not there received and, accordingly, the evidence did not address itself to those considerations. At the conclusion of that proceeding the examiner recommended substantial increases in fares up to 200 per cent, and the present appellants concurred in substantial increases provided the ferries continue to operate. This record was not available to the Commission or consid-

ered by it at the time it refused to act in the present matter. The Commission has since failed to act further in the rate matter. The railroad obviously has encouraged non-action in the hope that the instant case may render that proceeding moot.

To rely upon two such irrelevant and inadequate records to support the instant case while refusing to consider present facts raised on complaint and protest is certainly the type of abusive action which the Administrative Procedures Act was designed to prevent.

CONCLUSION

No attempt has been made here to present a detailed brief and argument on the merits of the case. The Jurisdictional Statement filed herein by appellants states the issues and outlines the arguments. Pending availability of the printed record, little more can be added at this stage of the proceeding. But the serious problems which exist in the construction to be placed upon Section 13a(1) are clear. Until they are resolved, neither the Commission nor the railroads will understand their respective roles under Section 13a(1). As the Commission knows, the impact of this indecision is already making itself felt on the traveling public.

Appellants submit that the issues presented on this appeal are substantial; that they are of general public interest and merit fuller consideration by this Court than is possible at this preliminary stage. Appellees' motions to affirm should be denied; or, in the alterna-

tive, ruling thereon should be deferred until such time as the case is submitted on the merits.

Respectfully submitted,

February 17, 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 622

CITY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF RUTHERFORD, BOGOTA, DEMAREST, HARRINGTON PARK, HASBROUCK HEIGHTS, NORWOOD AND THE TOWNSHIP OF TEANECK AND CITIZENS UNITED TRANSIT COMMITTEE,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

PETITION FOR REHEARING

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IN THE

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COUNTY OF BERGEN, STATE OF NEW JERSEY; ET AL.;
Appellants,

v.

UNITED STATES OF AMERICA; ET AL.;
Appellees.

On Appeal from the United States District Court for the District of New Jersey

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PETITION FOR REHEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now appellants[1] and petition this Honorable Court for rehearing of the per curiam decision entered herein March 2, 1959, granting motions of appellees to

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[1] County of Bergen, State of New Jersey; County of Rockland, State of New ork; the Boroughs of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood and The Township of Teaneck, municipal corporations of the State of New Jersey; and Citizens United Transit Committee, an unincorporated association of users.

affirm the decision of the District Court and affirming the judgment entered thereupon.

JURISDICTION

This petition is filed pursuant to Rule 58, paragraph 1, of the Revised Rules of this Court, and in accordance with the Order of this Court herein dated March 11, 1959 directing this petition for rehearing to be filed on or before March 18, 1959.

Notice of Appeal herein was filed by appellants on December 29, 1958. Appellants' Statement as to Jurisdiction was filed four days later on January 2, 1959 pursuant to order of the District Court as a condition to the stay of its judgment and decree therein. A Motion to Affirm was filed by appellee, The New York Central Railroad Company, on January 13, 1959, and by appellees, The United States of America and Interstate Commerce Commission, on January 29, 1959. Brief of Appellants in Opposition to Appellees' Motions to Affirm was filed on February 17, 1959. A per curiam decision granting appellees' Motions to Affirm was entered herein by this Court on March 2, 1959.

REASON FOR PETITION FOR REHEARING

In support hereof appellants assert that the judgment thus affirmed is in direct conflict with and contrary to, *inter alia,* the earlier holding of this Court in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939); that, therefore, it alters said earlier decision; and that this Court, in affirming, did so without an appreciation of the impact thus engendered against said earlier decision and, hence, acted contrary to the real intent of this Court.

SUMMARY OF ARGUMENT

The jurisdiction of the District Court was invoked under several statutes but particularly under 28 USC § 1336. The District Court, however, found itself to be without jurisdiction under said § 1336 and, therefore, dismissed the action thereunder and declined to consider on its merits the validity of the action of the Commission there challenged. In so doing the District Court acted contrary to and probably in ignorance of the significance of *Rochester Telephone Corp., supra,* which significance, through inadvertence, was not especially called to its attention. Until now, neither has it been called to the attention of this Court. Therefore, because of the serious damage to *Rochester Telephone Corp., supra,* affirmation herein has engendered, this Court is asked to rehear this matter.

ARGUMENT

The Court, in affirming per curiam the decision below, quite evidently has acted under the same misunderstanding as did the District Court which concluded itself to be without jurisdiction under § 1336, 28 U. S. C. (1952), upon the theory that:

> "No 'order' of the Commission is here complained of. Its written notice that it would not investigate the complaint does not constitute such action as is reviewable under § 1336 *supra.*"[2] (JS 5a)[3]

[2] The NOTICE of the Commission actually did not say that it would not investigate the Complaints; this, apparently, was left to implication. What the NOTICE did say was that the Commission ". . . has concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued, in whole or in part." (JS 30a)

[3] "JS" denotes Appellants' Jurisdictional Statement; "5a" denotes page 5 of the appendix thereto.

and, consequently, ". . . the action is not one to 'enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission . . .'" (JS 5a) citing and quoting from in support thereof *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299 (1927), and *cf. Rochester Telephone Corp.* v. *United States, supra.* Thereupon, the District Court declined to decide under 28 U. S. C. § 1336 (1952) the case on the merits relating to the validity of the action taken by the Commission under § 13a(1), 49 U. S. C.

But the cited authorities do not support the contention of the District Court and, indeed, are in direct conflict with it. It is inescapable that the District Court failed to understand the concepts advanced, for its decision, summarily affirmed by this Court, revives the once lively so-called "negative order" doctrine of *Procter & G. Co.* v. *United States*, 225 U. S. 282 (1912) which this Court, in *Rochester Telephone Corp., supra,* expressly laid to rest.

Rochester Telephone Corp., supra, 307 U. S. from page 129, found that the then prior decisions involving the "negative order" doctrine fell into three categories:[4]

> "(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission . . .
>
> "(2) Where the action sought to be reviewed declines to relieve the complainant from a statu-

[4] For convenience these three categories hereinafter will be identified and referred to as Category (1), (2) or (3) respectively without repeating their content each time.

tory command forbidding or compelling conduct on his part . . .

"(3) Where th action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person."

This Court (through Mr. Justice Frankfurter) went on to exemplify these three categories, the first of which was found to have existed in *Los Angeles & Salt Lake R. R. Co., supra,* where the "order" sought to be reviewed did not of itself adversely affect complainant but only would affect his rights adversely on the contingency of some future administrative action. Such a situation is presented by an attempt to review a valuation made by the Commission which has no immediate legal effect although it may form the basis of a subsequent rate order. That was the situation obtaining in *Los Angeles & Salt Lake R. R. Co., supra,* which this Court in *Rochester Telephone Corp., supra,* cited as an example of Category (1):

"The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a 'final valuation' under the Valuations Act [March 1, 1913, 37 Stat. at L. 701, chap. 92, 49 U. S. C. A. § 19a]: *'The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right*

> *or obligation.*' United States v. Los Angeles & S. L. R. Co., 273 U. S. 299, 309, 310, 71 L. ed. 651, 655, 656, 47 S. Ct. 413." *Rochester Telephone Corp., supra,* 307 U. S. at pages 130, 131 (italics supplied)

In citing *Los Angeles & Salt Lake R. R. Co., supra,* and quoting therefrom the above italicized language (JS 5a), the District Court in the instant case quite mistakenly conceived the action of the Commission under Section 13a(1) of the Interstate Commerce Act, 49 U. S. C., to fall into those decisions of Category (1), a misconception made painfully clear from a knowledgeable reading of *Rochester Telephone Corp., supra;* for the wrong here sought to be remedied is immediate without that further action of the Commission required of a Category (1) case.

It is almost inescapable that the instant case falls into Category (3). That is, the action of the Commission sought to be reviewed [*i.e.,* its decision not to investigate] does not forbid or compel conduct on the part of the person seeking review [*i.e., appellants*] but is attacked because it does not forbid or compel conduct by a third person [*i.e.,* does not forbid The New York Central Railroad Co. from discontinuing its service or, alternatively, compel it to continue the service]. The foregoing sentence has been couched in language identical to that used by this Court in *Rochester Telephone Corp., supra,* in an effort to illustrate how completely the instant case is controlled by that decision. And, unlike Category (1), federal courts do have jurisdiction under 28 USC § 1336 to determine cases falling into Category (3).

(A) If the District Court were correct and this is a Category (1) case, then the only person entitled to

judicial review of the Commission's action under Section 13a(1) of the Act is the carrier and then only after the Commission has investigated and affirmatively ordered the carrier to continue the service sought to be discontinued. That is to say, even after a full hearing in which they participated throughout, appellants and others similarly situated, under the holding of the District Court here affirmed, could not test the action of the Commission in a Section 13a(1) case notwithstanding the express statutory provisions of 28 USCA §§ 1336, 2321, 2323. This is true, because even after a full investigation and public hearing if the Commission does not find and conclude that the service sought to be discontinued should, in fact, continue in operation, then the effect of its determination would be identical to that if it had, in the first instance, elected not to investigate or otherwise require continuance of the service. The investigation merely terminates as though it had never existed.

For example, in its very first determination under Section 13a(1) wherein a full investigation was had,[5] the Commission a few weeks ago concluded merely to cease its investigation into the matter. There was issued no order as understood by the District Court to be necessary for judicial review under § 1336, 28 USC. There was merely a discontinuance of the investigation; the Railroad did the rest. There was no order of the Commission directing the Railroad, or anyone else for that matter, *to do, or refrain from doing, anything;* it did not *extend or abridge any power or facility;* subject *the carrier to any liability or future status or condition;* or *determine any right or obligation* in any

[5] *Great Northern Ry. Co.—Discontinuance of Service,* I. C. C. Finance Docket No. 20[illegible]8 (1959).

respect in any manner more than if the Commission, as it did in the instant case, had elected in the first place to conduct no investigation or otherwise require the railroad service to continue. And, yet, in abandoning its investigation the Commission may well have acted contrary to all of the evidence and otherwise in a most unjust and unlawful manner. And, yet, participants in the investigation, under the theory of the District Court, are powerless to act, because there exists no affirmative "order". The only time judicial review could be had of anything done or omitted to be done by the Commission under Section 13a(1) would be when the Commission, after an investigation, directs the railroad service to continue, and then judicial review could be had only upon complaint of the railroad. It hardly seems possible to find from the language of Section 13a(1) a congressional intent to guarantee railroads complete judicial review of adverse decisions while denying users and other interested participants any judicial review at all. *Cf. United States* v. *Interstate Commerce Commission*, 337 U. S. 426 (1949).

Because the premise is incorrect, the theory of the District Court as to its lack of jurisdiction under 28 USC § 1336 is incorrect.

(B) That which has been stated under (a) above is merely one logical consequence of the action of the District Court; it is not believed the District Court followed through this consequence of its own decision and, hence, acted in ignorance thereof. Rather did the District Court quote out of context from *Los Angeles & Salt Lake R. R. Co., supra.*

Certainly the instant proceeding falls into Category (3) as defined by *Rochester Telephone Corp., supra.*

And there this Court laid down four prerequisites to the existence of judicial review:[6]

> (1) Were appellants authorized to file their complaint with the Commission?
>
> (2) Did the complaint thus filed give rise to an adjudication—constituting a case or controversy?
>
> (3) In seeking judicial review were the requisites of equity by conventional criteria satisfied?
>
> (4) Were appellants within the express language of Congress authorizing participation in the suit below?

The instant case satisfies readily all four of these prerequisites. (1) Section 13a(1) expressly provides for the filing of complaints and, although unlike § 13(1) and (2) which expressly define those parties who may file complaints, there can be no doubt but that appellants and other similarly situated were contemplated by the Congress as complainants therein. This belief is fortified by a process of elimination. If not appellants and other similarly described, then who would file a complaint as provided by Section 13a(1)—not the Commission because § 13a(1) provides that the Commission may act ". . . either upon complaint *or upon its own initiative without complaint*" (italics supplied). Consequently, if the Commission were to act upon its *own initiative,* it would do so *without complaint.* And certainly the railroad was not intended to be the complaining party, because it would then be complaining of its own action. Clearly, then, the users of the service and those other persons described in § 13(1) and (2)[7]

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[6] *Rochester Telephone Corp.* v. *United States, supra,* 307 U. S. at p. 136.

[7] See also 28 USC § 2323.

were intended as persons authorized to file complaints under § 13a(1), because otherwise the provision for the Commission to proceed *either upon complaint* would be meaningless.

Furthermore, in the instant case the notice posted by the railroad in its terminals and subsequently filed with the Commission contained the following invitation which appellants promptly accepted.

> "Any person objecting to such discontinuance should promptly notify the Interstate Commerce Commission, Washington 25, D. C."[8]

(2) The second prerequisite— whether the complaint to the Commission gave rise to an adjudication constituting a case or controversy—was satisfied in at least two respects.[9] (a) Appellants challenged the validity of the notice filed by the railroad and alleged that it failed to comply with statutory requirement. (b) Appellants also challenged the evidentiary foundation of the railroad's action, requested an opportunity to offer evidence on public convenience and necessity and considerations of interstate commerce, and offered to prove thereby the existence of these three standards as requiring continuation of the service, albeit at a quantity reduced to coordinate with the West Shore commuter trains of which ferries constitute the essential and sole link to New York City. The action, or perhaps, inaction of the Commission adjudicated all of these contentions contrary to the interests of appellants. Thus, there existed a "case or controversy" of the same quality as exists in the companion case under § 1(18) of the Act, 49 USC (This Term, No. 41).

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[8] Plaintiffs' Exhibit No. 1.

[9] See *Rochester Telephone Corp., supra*, 307 U. S. at p. 140.

(3) The third requirement, the existence of equitable prerequisites as determined by the conventional criteria, are present in the instant case, for the harm and injury threatened to appellants by the proposed discontinuance of service would be immediate and irreparable for which there exists no adequate remedy at law.[10] Indeed, there has never existed any doubt on this point, and the District Court, fully recognizing the immediate and irreparable nature of the threatened injury, without legal redress, readily issued its interlocutory injunction in the instant case as it had a year earlier in the § 1(18) case (This Term, No. 41). *Bd. of Public Utility Comm.* v. *United States,* 158 F. Supp. 98 (DC N.J. 1957).

(4) And, finally, the fourth prerequisite is satisfied, for appellants are included within the express language of paragraph 3, § 2323, 28 USC:

> "Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof."

The present suit was instituted by State of New Jersey, et al., appellants in No. 621 (This Term), against all three appellees herein. Appellants herein, pursuant to 28 USC §2323, upon due application, were granted leave by the District Court to intervene as plaintiffs (JS 4a).[11]

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[10] 19 Am. Jur., Equity, § 29

[11] And, of course, once having been permitted to intervene, appellants were then, entitled to proceed as though they were original plaintiffs.

(C) The instant case presents a situation almost identical to that of *Procter & G. Co.*, supra[12] and would be controlled by the "negative order" doctrine there launched had it not been for the remedial holding of *Rochester Telephone Corp.*, supra.

Because the instant case so readily satisfies the requirements of Category (3) of *Rochester Telephone Corp.*, supra, and is so dissimilar to those decisions of Category (1) as to place jurisdiction clearly in the District Court pursuant to 28 USC § 1336, appellants did not contest seriously the contrary contention advanced by the railroad. As a result, the District Court was unadvised of the serious consequences flowing from its determination that it was without jurisdiction to determine the matter under § 1336, 28 USC, in accordance with the procedure of § 2321 *et seq* of that title. Indeed, *Rochester Telephone Corp.*, supra, was not pressed upon the District Court in a manner calculated to have that Court attach any particular significance to the holding. Accordingly, the District Court failed to comprehend or appreciate the significance of its determination in light of *Rochester Telephone Corp.*, supra.

It is, of course, for this Court alone to determine whether to invalidate and reverse its holding in

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[12] *Procter & G. Co.*, supra, was a suit commenced under 36 Stat. 1148 before the old Commerce Court the jurisdiction of which under 36 Stat. 1148 was transferred to a 3-judge District Court by 28 USCA § 1336 (see Historical Note preceding annotation). There, Procter & G. Co. filed a complaint with the Commission which the Commission dismissed, because the complaint requested the Commission to compel action by a third party, a railroad. On appeal this Court held there to exist no jurisdiction under 36 Stat. 1148 (now 28 USCA § 1136). Of course, that decision was reversed by *Rochester Telephone Corp.*, supra.

Rochester Telephone Corp., supra, and to reinstate the negative order doctrine of *Procter & G. Co.*, supra. However, appellants do not believe this Court to intend for its affirmation of the District Court herein to accomplish this undesirable end and, accordingly, ask for rehearing.

CONCLUSION

It has not been argued here whether the Administrative Procedures Act, 5 USC § 1009 (1952) at least codified the law then existing in 1946, the year of its original enactment [and probably enlarged upon it] so as to make inapplicable the holding of this Court in *Panama Canal Company* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), inasmuch as *Rochester Telephone Corp.*, supra,[13] defines the scope of judicial review in phrases similar to the Administrative Procedures Act. Neither have the numerous other contentions heretofore advanced been argued here, although anyone of them would be sufficient to justify reversal of the District Court. In the event rehearing is granted, as it surely must, this is not to be construed as a waiver of these other issues, for by this petition your appellants reiterate each and every issue set forth in their Statement as to Jurisdiction and their arguments presented in their Brief in Opposition to Appellees' Motions to Affirm.

Rather is this petition intended to call to the attention of this Honorable Court that which perhaps might be considered the most serious defect in the decision

[13] 307 U.S. at p. 140. There is now pending before the Congress a bill to amend the Administrative Procedures Act, 5 U.S.C. §§ 1001 to 1011, which amendment is calculated to remedy the error of the District Court herein. S. 1070, 86th Cong., 1st Session (February 16, 1959).

of the District Court summarily affirmed herein. The difficulty is magnified by the fact that *Rochester Telephone Corp.*, supra, so clearly supports the contention of jurisdiction under § 1336, 28 U.S.C., as advanced by appellants, that it was never seriously considered in doubt until the decision of the District Court was handed down.

Subsequent utterances upon the two floors of the Congress fully support the statutory interpretation of § 13a(1) heretofore advanced by appellants. Indeed, so contrary to Congressional intent as to the existence of judicial review has been the decision of the District Court as affirmed herein per curiam that remedial legislation has already been introduced in the United States Senate by and on behalf of no less than eight leading Senators.[14] In addition, Senator Williams of New Jersey has introduced a bill on March 18, 1959 making more definite the meaning of § 13a(1) as in conformity to that construction heretofore argued by appellants.[15]

To date, two experienced state regulatory agencies[16] on five separate occasions over the past four years, after full and complete investigation and public hearing, have recognized the need for the continuation of the Weehawken Ferries and have been seeking to effect a remedy to their deficit character but with no cooperation from the railroad. Indeed, the hearing

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[14] S. 1331, 86th Congress, 1st Session, introduced March 9, 1959, by Senator Case of New Jersey on behalf of himself and Senators Bush, Clark, Dodd, Javits, Keating, Newberger and Kuchel. See in addition Vol. 105, Congressional Record, No. 37, from p. 3147 (86th Cong., 1st Session).

[15] See Appendix A.

[16] The Board of Public Utility Commissioners of the State of New Jersey and the Public Service Commission of the State of New York.

examiner of the Interstate Commerce Commission upon the only relevant record ever made before the Commission recommended that discontinuance be permitted only upon condition that the railroad forthwith institute an alternative service.[17] In addition, the Commission has authorized very substantial rate increases of up to 200 per cent which together with a reduction of service to coordinate with the West Shore commuter trains operating into the Weehawken terminal, at which point the commuters load the ferries to continue onto Manhattan, would convert this deficit service into a substantial profit making operation. All of those things were fully known to the Commission, including the existence of more than 7,000 commuters[18] (14,000 round trips) who regularly utilize the ferries. And still the Commission refused to investigate; such is the character of arbitrary action which the Court has found itself powerless to review under § 1336, 28 U.S.C.

Whether the Weehawken ferries are to sink beneath the waters of the Hudson River leaving 7000 commuters to sink or swim may be in itself a matter so local in nature as to collect small national significance. But when the technique and procedure utilized to effect that discontinuance are based upon a statutory interpretation which is having a direct impact upon 27 similar cases[19] involving approximately 100 passenger

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[17] *New York Central—Weehawken Ferry Abandonment*, I.C.C. Finance Docket No. 18781, Examiner's proposed report.

[18] *New York Central R. Co. Ferry Abandonment*, 295 I.C.C. 519, 521 (1957).

[19] Including, among the several proposals of the New York Central R. Co., one to discontinue some but not all of the West Shore trains now dependent upon the continued operation of the ferries. *New York Central R. Co. Discontinuance of Service—Weehawken, N.J.,—West Haverstraw, N.Y.*, I.C.C. Finance Docket No. 20487.

trains in every part of the country currently pending before the Commission, it is submitted that the existence of judicial review under § 1336, 28 U.S.C., obtains a status of national importance calling upon this Court to act in a manner consistent with its past declarations, particularly *Rochester Telephone Corp., supra.*

Upon this petition and the other pleadings herein, appellants respectfully urge this Honorable Court to grant rehearing and, upon further consideration, that its per curiam decision entered hereon on March 2, 1959 granting appellees' motions to affirm and affirming the judgment of the District Court be revoked and, thereafter, probable jurisdiction noted and the case decided on its merits consistent with existing law.

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Dated: March 18, 1959

Certificate of Counsel

I, William A. Roberts, a member of the Bar of this Court and of counsel for appellants, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

WILLIAM A. ROBERTS,
Attorney for Appellants.

APPENDIX A

Mr. Williams of New Jersey introduced the following bill; which was read twice and referred to the Committee on Interstate and Foreign Commerce.

A BILL

INTERSTATE COMMERCE ACT
(Insert title of bill here)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13a(1) of the Interstate Commerce Act, as amended, is hereby amended to read as follows:

"Sec. 13a(1). A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon filing of such notice the Commission shall forthwith enter upon an investigation, and set the same for public hearing, of the

proposed discontinuance or change and its effect on public convenience and necessity and upon interstate or foreign commerce. The Commission shall notify the Governor of each State in which such train or ferry is operated of the time and place of such public hearing at least thirty days in advance thereof. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least seven days prior to the day on which such discontinuance or change would otherwise become effective, shall require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation. If, after hearing in such investigation, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.